Supreme Court, U.S.
FILED

(1)

No. 93 1721 APR 29 1994

OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1993

COBB COUNTY, GEORGIA,

*Petitioner,*

*vs.*

BRUCE S. HARVEY and JAMES D. CUNNINGHAM,

*Respondents.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## PETITION FOR A WRIT OF CERTIORARI

JERRY L. GENTRY
Cobb County Law Department
100 Cherokee Street, Suite 595
Marietta, Georgia 30090-9689
(404) 528-4000

CHARLES B. TANKSLEY
*Counsel of Record*
BARNES, BROWNING, TANKSLEY & CASURELLA
166 Anderson Street, Suite 225
Marietta, Georgia 30060
(404) 424-1500

FRED D. BENTLEY, JR.
BENTLEY, BENTLEY & BENTLEY
260 Washington Street
Marietta, Georgia 30060
(404) 422-2300

*Attorneys for Petitioner*

5123
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

## QUESTIONS PRESENTED

1. Whether a three (3) x five (5) foot framed panel of the Ten Commandments which was donated by a private citizen in 1939 and which hangs on the wall at the end of a hall in the Cobb County State Court Building violates the Establishment Clause of the First Amendment of the United States Constitution.

2. Whether an attorney who has seen the panel has citizen standing to challenge the panel on First Amendment grounds when he neither avoids nor seeks out the panel and has neither modified his behavior nor altered his law practice.

3. Whether a municipal/county taxpayer has taxpayer standing where there has been no appropriation of public funds for the acquisition, installation, preservation or maintenance of the panel.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Table of Contents | ii |
| Table of Citations | iii |
| Opinions Below | 1 |
| Statement of Jurisdiction | 2 |
| Constitutional Provisions Involved | 2 |
| Statement of the Case | 3 |
| A. The Display of the Ten Commandments. | 3 |
| B. The Origin and History of the Panel. | 3 |
| C. Proceedings Below | 4 |
| Reasons for Granting the Writ | 5 |
| I. The decision of the United States Court of Appeals for the Eleventh Circuit is in conflict with the decisions of this Court in *Lemon v. Kurtzman* as interpreted in *Lynch v. Donnelly,* and *Allegheny v. ACLU of Pittsburgh.* | 5 |
| II. The decision of the United States Court of Appeals for the Eleventh Circuit creates a conflict among the Circuit Courts with regard to displays of the Ten Commandments on courthouse premises. | 12 |

*Contents*

*Page*

III. The decision of the United States Court of Appeals for the Eleventh Circuit conflicts with the decision of this Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, with regard to citizen standing and taxpayer standing. ..... 14

IV. There is a conflict among the Circuit Courts in the application of *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, with regard to citizen standing. ..... 18

V. The case involves extremely important questions of constitutional law involving the Establishment Clause of the First Amendment which are unsettled and should be settled and which are having a devastating impact on America's social and cultural well being. ..... 18

Conclusion ..... 25

## TABLE OF CITATIONS

**Cases Cited:**

*Abington School District v. Schempp*, 374 U.S. 203, 83 S. Ct. 1050, 10 L. Ed. 2d 844 (1963) ..... 13, 16

*Allegheny v. ACLU of Pittsburgh*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) ..5, 6, 7, 8, 9, 11, 19, 20, 24, 26

*ACLU v. Rabun County*, 798 F.2d 1098 (11th Cir. 1983) .. 18

*Contents*

*Page*

*Anderson v. Salt Lake City Corporation*, 475 F.2d 29, *cert. denied*, 414 U.S. 879 (10th Cir. 1973) ..... 12, 13

*Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 ..... 13

*Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947) ..... 19

*Freedom from Religion Foundation v. Zielke*, 845 F.2d 1463 (7th Cir. 1980) ..... 18

*Gladstone Realtors v. Village of Bellwood*, 441 U.S. 100, 99 S. Ct. 1608 ..... 15

*Lamb's Chapel, et al. v. Center Moriches School District, et al.*, __ U.S. __, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993) ..... 6

*Lee v. Weissman*, __ U.S. __, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) ..... 6, 24

*Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) .....5, 6, 7, 11, 19, 20, 24, 26

*Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) .....5, 6, 11, 13, 19, 20, 21, 24, 26

*Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983) ..... 19

*Contents*

*Page*

*Saladen v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1989) ..... 18

*Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980) ..... 6, 7, 13

*Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 70 (1982) ..... 15, 16, 17, 18, 26

*Witters v. Washington Dept. of Svcs. for the Blind*, 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846 (1986) ..... 7, 9

*Worth v. Seldin*, 422 U.S. 501, 95 S. Ct. 2206 ..... 15

*Zurich v. Claussen*, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952) ..... 19

**Statutes Cited:**

28 U.S.C. § 1254(1) ..... 2

28 U.S.C. § 2101(c) ..... 2

42 U.S.C. § 1983 ..... 4

42 U.S.C. § 1988 ..... 4

**United States Constitution Cited:**

First Amendment ..... i, 2, 5, 6, 18, 23, 24, 25, 26

*Contents*

*Page*

Fourteenth Amendment ..... 2, 20

Article III, § 2 ..... 2, 14, 17, 18

**Rule Cited:**

F.R.C.P. 65(a)(2) ..... 4

**Other Authorities Cited:**

Bennett, Book of Virtues (Simon Shuster 1994) ..... 21

Stephen L. Carter, *The Culture of Disbelief,* "How American Law and Politics Trivialize Religious Devotion" (Basic Books 1993) ..... 21

Tribe, *American Constitutional Law* (2d Ed. 1988) at 1296 ..... 9

**APPENDIX**

Appendix I—Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit Filed January 31, 1994 ..... 1a

Appendix II—Opinion and Order of the United States District Court for the Northern District of Georgia, Atlanta Division Filed January 13, 1993 ..... 3a

Appendix III—Order of the United States Court of Appeals for the Eleventh Circuit Denying Stay Filed March 14, 1994 ..... 24a

*Contents*

*Page*

Appendix IV—Order of the United States District Court Granting Stay Pending Appeal to the Eleventh Circuit Dated March 8, 1993 ..... 26a

Appendix V—Excerpts from Trial Transcript of April 23, 1992 ..... 28a

No.

In The

# United States Supreme Court

October Term, 1993

COBB COUNTY, GEORGIA,

*Petitioner,*

*vs.*

BRUCE S. HARVEY and JAMES D. CUNNINGHAM,

*Respondents.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Cobb County, Georgia, respectfully prays that a writ of certiorari issue to review the decision of the Eleventh Circuit entered in the above-entitled case on January 31, 1994.

## OPINIONS BELOW

The per curiam opinion of January 31, 1994 affirming the Order of the United States District Court for the Northern District of Georgia for the reasons set forth in the District Court's Order was not published. It appears as App. I, pp. 1a, 2a.

The Opinion of the District Court of January 13, 1993 granting a permanent injunction and declaratory relief is reported at 811 F. Supp. 669 and appears as App. II, pp. 3a-23a.

## STATEMENT OF JURISDICTION

The Opinion of the Eleventh Circuit was entered and filed on January 31, 1994. Petitioner submits this timely Petition for a Writ of Certiorari to the Eleventh Circuit. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) and § 2101(c).

## CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this case are:

1. The Establishment Clause of the First Amendment as made applicable to the states through the Fourteenth Amendment. The Establishment Clause of the First Amendment states:

> Congress shall make no law respecting an establishment of religion. . . .

U.S. Const. Amend. I.

2. The Judicial Power Clause of Article III of the Constitution which states:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution. . . .

U.S. Const. Art. III, § 2, ¶ 1.

## STATEMENT OF THE CASE

### A. The Display of the Ten Commandments.

The display in dispute in this case is a three (3) x five (5) foot framed panel that, until March 15, 1994, hung on the wall in the hallway of the first floor of the Cobb County State Court Building which is part of a larger Cobb County judicial complex. The text of the Ten Commandments contained in the wood frame panel appears at App. II, pp. 5a-7a. The text includes the Ten Commandments and the "Great Commandments" by Jesus Christ.

### B. The Origin and History of the Panel.

The panel was donated to Cobb County, Georgia by the Gardener family sometime before 1939. Between 1939 and 1967, the panel hung on the outside wall of the original Cobb County Courthouse. While hanging there, it was occasionally cleaned and otherwise maintained by the local chapter of the Daughters of the American Revolution. (App. V, pp. 54a-57a.)

In 1967, certain historical artifacts from the original courthouse, including the panel, a bell, a cornerstone and an old courtroom bench, were removed when the original courthouse was destroyed. Most of the items were prominently displayed in the courtyard between the new courthouse and Public Safety buildings. The panel was placed in its present location on an alcove wall in the hall of the Cobb County State Court Building. The panel was moved by Cobb County inmates who were in the custody of Cobb County, Georgia. Since 1967, the panel has been dusted by a night cleaning crew consisting of Cobb County prisoners and a building and maintenance supervisor for Cobb County, Georgia. On one occasion the panel was removed so that the heavy build up of nicotine around and behind the panel could be cleaned. (App. V, pp. 30a-34a, 38a-40a.)

The County passed no resolution directing purchase or installation of the panel nor any resolution or proclamation acknowledging or proselytizing about the panel. The County has never appropriated any funds to purchase, mount, install or maintain the panel.

**C. Proceedings Below.**

In 1992 Respondents sued Cobb County, Georgia seeking declaratory and injunctive relief requiring the removal of the framed panel of the Ten Commandments and the Great Commandments hanging in the hall of the Cobb County State Court Building. The Respondents contended that the panel violates the Establishment Clause of the First Amendment of the United States Constitution as applicable to the States under the Fourteenth Amendment in that it constituted the establishment of religion or acts intended to establish religion in violation of their civil rights under 42 U.S.C. § 1983 and § 1988.

In April 1992, the District Court consolidated the preliminary injunction hearing with the trial on the merits pursuant to F.R.C.P. 65(a)(2).

On January 13, 1993, the District Court entered an Order containing findings of fact and conclusions of law and held that the panel has the effect of endorsing religion in general and Christianity in particular and therefore violates the Establishment Clause. (App. II, pp. 4a, 21a.)

The court granted the Plaintiffs' Motion for Injunctive Relief but stayed the Order for four months to give the County, in consultation with Plaintiffs, an opportunity to develop an educational display incorporating the Ten Commandments panel. Rather than erecting this display, the County chose to appeal. In March 1993, the District Court entered an Order removing the stay,

but, upon motion by Petitioner Cobb County, suspended the injunction pending the appeal of this action to the Eleventh Circuit. (App. IV, pp. 26a-27a.)

The Petitioner Cobb County, Georgia filed a Notice of Appeal to the Eleventh Circuit. Following the submission of briefs and oral argument, the Eleventh Circuit entered an opinion per curiam dated January 31, 1994 affirming the District Court's Order granting an injunction for the reasons set forth in the Order of the District Court under date of January 13, 1993. (App. I, p. 1a.)

Petitioner Cobb County, Georgia filed a timely motion for a stay in the Eleventh Circuit which was denied in an Order of the Eleventh Circuit dated March 14, 1994. (App. III, pp.. 24a-25a.)

The Petitioner now submits this timely Petition for a Writ of Certiorari to the Eleventh Circuit.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN *LEMON V. KURTZMAN* AS INTERPRETED IN *LYNCH V. DONNELLY*, AND *ALLEGHENY V. ACLU OF PITTSBURGH*.

The Eleventh Circuit and the District Court held that a three (3) x five (5) foot panel of the Ten Commandments and the Great Commandments, which was donated by a private citizen in 1939 and which hangs on a wall in the hall of the Cobb County State Court Building is essentially a religious text in the Jewish and Christian traditions and that the panel standing alone in a County Courthouse violates the Establishment Clause of the First

Amendment of the United States Constitution. (App. I and II, pp. 1a-4a.) These conclusions of law constitute a finding that a panel of the Ten Commandments alone in a courthouse is *per se* a violation of the Establishment Clause.

The ruling that there is an endorsement of religion in general and Christianity in particular, and thus a violation of the Establishment Clause, misconstrues and erroneously applies the principles of law set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), as interpreted in *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) and *Allegheny v. ACLU of Pittsburgh*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989). The District Court also erroneously applied *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980).

As of the writing of this brief, this Court has expressly stated that *Lemon v. Kurtzman* remains the law of the land.[1] *Lee v. Weissman*, __ U.S. __, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992); *Lamb's Chapel, et al. v. Center Moriches School District, et al.*, __ U.S.__, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993).

The entire three prong test of *Lemon v. Kurtzman* need not be repeated here. It appears that *Lynch v. Donnelly, supra,* and *Allegheny v. ACLU of Pittsburgh, supra*, have focused the *Lemon* analysis primarily on the second prong[2] of the *Lemon* test. Specifically, "the statute or practice if it is to be permissible under

---

1. The Petitioner Cobb County, Georgia urges this Court to revisit *Lemon v. Kurtzman, supra,* in Section V of this Petition.

2. Likewise, the Honorable Marvin J. Schoob, District Judge for the Northern District of Georgia, in Footnote 8 of his opinion noted that the Court did not reach the first and third prongs of the *Lemon* test and thus, the crux of this case is premised on the erroneous application of the second prong to the instant facts.

the Establishment Clause . . . must neither advance nor inhibit religion in principle or primary effect." *Lynch v. Donnelly*, 465 U.S. at 612-613, 91 S. Ct. at 2111. In *Allegheny v. ACLU of Pittsburgh, supra*, the Court again focused on this second prong of the test and, with reference to *Lynch v. Donnelly, supra*, determined that the display of a religious symbol by government is unconstitutional if it has the effect of endorsing religious beliefs, and that the effect of the government's use of religious symbolism depends upon its context. *Allegeheny v. ACLU of Pittsburgh, supra* at 597, 109 S. Ct. 3103. The task in each case the court noted, "is to determine whether the display . . . in [its] particular physical setting has the effect of endorsing or disapproving religious beliefs."

The District Court Order and the Eleventh Circuit Order simply find that the Ten Commandments is a religious text in the Jewish and Christian tradition, that it hangs alone on a wall in a hall in the courthouse building and thus constitutes an endorsement of religion.

Petitioner respectfully submits that this is not the sort of careful overall factual analysis of the context prescribed by *Allegheny* and the decisions fail to judge the panel of the Ten Commandments in this case according to the standard of a reasonable observer. *See Allegheny* at 492 U.S. at 620, 109 S. Ct. at 3115, citing *Witters v. Washington Dept. of Svcs. for the Blind*, 474 U.S. 481, 493, 106 S. Ct. 748, 754, 88 L. Ed. 2d 846 (1986). The lower courts avoided their responsibility for analyzing the privately donated panel here by erroneously relying on *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980), a case where the legislature had mandated the posting of the Ten Commandments in public school classrooms for what appeared to this Court to be religious purposes.

Unlike the creche in *Lynch or Allegheny*, which no doubt is

itself capable of communicating a religious message, the Ten Commandments standing alone can reasonably be found to send a more equivocal message. In *Allegheny,* Justice Stevens, concurring in part and dissenting in part, observed with regard to a carving of Moses holding the Ten Commandments, "this alone conveys an equivocal message, perhaps of respect for Judaism, for religion in general or for law." *Allegheny* at 492 U.S. 652, 109 S. Ct. 3132.

What the Eleventh Circuit found to be an endorsement of religion in general and Christianity in particular more likely sends an equivocal message to a reasonable observer. Using this equivocal message as a point of departure, application of *Allegheny* requires a careful analysis of the context of the display to determine whether the County did or failed to do anything that would adorn the panel or transform it into an impermissible advancement or inhibition of religion.

The only similarity the context of the Ten Commandments has with the context of the creche in *Allegheny* is that the Ten Commandments panel is alone. By carefully tracking the analysis in *Allegheny* it becomes overwhelmingly apparent that Cobb County, Georgia has neither done anything nor failed to do anything to endorse any religious message.

The panel is on the wall alone. There is a simple marble bench below the place on the wall where the Ten Commandments panel was hung, but the bench was there before the panel was moved to the new building and the bench remains there since the panel has been taken down. There is nothing which in anyway constitutes an adornment or monumental detail so as to enshrine or enhance the isolation in which the panel hangs.

There are no floral decorations, seasonal or otherwise, that serve to draw one's attention to the panel. *Allegheny,* 492 U.S. at 599, 109 S. Ct. at 3104.

The location in the hall where the panel hangs has never been used as the site for celebrating cultural or religious holidays. *Allegheny, id.* at 599, 109 S. Ct. at 3104.

The panel does not hang on a grand staircase or at the most beautiful part of the building. *Allegheny, id.* at 599, 109 S. Ct. 3104. The County has never passed a resolution with regard to the panel and certainly has authored no press releases that make it clear to the public that the County associated itself with the panel or its message (except with regard to defending this litigation). In addition, the County has not created any visual link between itself and the panel by placing official county signs or evergreens or other items of adornment. *Allegheny, id.* at 600, 109 S. Ct. at 3104.

Allegheny further instructs that the constitutionality of a display's effect "must also be judged according to the standard of a 'reasonable observer'". (*Allegheny*, 492 U.S. at 620, 109 S. Ct. 3115 citing *Witters v. Washington Dept. Svcs for the Blind*, 474 U.S. 481, 493, 106 S. Ct. 748, 754, 88 L. Ed. 2d 846 (1986).)

When measured against this standard, the Ten Commandments panel in the hall in the Cobb County State Court Building should not be deemed unconstitutional on the grounds that it has the effect of endorsing religion. Plaintiff/Respondent, James D. Cunningham[3] candidly testified he did not receive a message of endorsement of religion from the panel. Although Mr. Cunningham views the panel as "purely religious", what the panel indicates to him is the influence of religion in general and Christianity in particular on our government and court system. (App. II, 10a.) The receipt of such a message by Plaintiff Cunningham is perfectly consistent with the historical significance

---

3. Plaintiff James Cunningham would appear to be the reasonable non-adherent envisioned in Tribe. American Constitutional Law (2d Ed. 1988) at 1296.

of the Ten Commandments testified to by two expert witnesses on the trial of the case who testified "that the Ten Commandments are one of many sectarian and non-sectarian influences on the formation of western law in general and the United States Constitution in particular." (District Court Order, Findings of Facts, App. II, p. 8a.)

Another effective means of ascertaining the effect of the panel in this case on the "reasonable observer" is to contrast the *allegations* of the fervent advocate for separation of church and state with the facts revealed to the observer reasonably informed by an inquiry into what the county actually did and did not do. Such an inquiry reveals another historical and permissible basis under the Constitution for allowing the panel to remain.

Plaintiffs originally alleged that the panel in question was acquired, installed, displayed and maintained by the County. (District Court Order and Opinion, App. II, p. 4a.)

The panel was not acquired by Cobb County, it was donated by the Gardener family some time before 1939. (District Court Order and Opinion, App. II, p. 8a.)

In 1967, the panel was moved from the original courthouse to its present location. It was not afforded any special treatment but was moved along with other heirlooms from the original Cobb County Courthouse. (District Court Order, App. II, p. 8a; Excerpts from Trial Transcript, App. V, pp. 65a-67a.) While the panel hung outside the original courthouse and was accessible to the public, it was maintained not by the County, not by a religious organization, but by a patriotic organization, The Daughters of the American Revolution. (Excerpts from Trial Transcript, App. V, p. 55a.) When the panel was moved, there was no indication that it was afforded transport by high officials or transported with pomp and circumstance; rather the panel was moved by Cobb County

inmates, individuals who, under the supervision of county maintenance staff, mop the floors and empty the trash. (Excerpts of Trial Transcript, App. V pp. 65a-66a.) The only maintenance afforded the panel is occasional dusting by Cobb County inmates or maintenance employees. The panel was removed once to allow inmates to clean nicotine stains off the wall. (Excerpts of Trial Transcript, App. V, pp. 33a-34a.) The reasonably informed observer would have to conclude first, that the County did not acquire the panel; it was donated. Secondly, it did not even rate placement inside the courthouse for protection from the elements when initially received. It was moved to avoid the wrecking ball and not to elevate its status and was afforded a lesser level of presentation than a bell and a cornerstone. Finally, it has received no greater preference in maintenance and care than that afforded to the floors and walls of the building. In retrospect, if the panel was truly a "religious display" one might fear public criticism for not having afforded a "religious display" more respect than this one has been afforded, but not a lawsuit alleging its use for the endorsement of religion.

To accept the *per se* analysis resulting from the lower courts' orders is tantamount to calling for removal of all references to the Ten Commandments or God from U.S. currency and from public buildings including the relief of Moses with the tablets which greets this Court daily and the refrain "One God, One Law, One Element, And One Far Off Divine Event To Which The Whole Creation Moves" in the Library of Congress.

It is abundantly clear when the principles of *Allegheny* are applied in straightforward fashion and the factual context of the panel with regard to both its physical setting and its history are analyzed, there is, in no way, an endorsement of religion. Therefore, the decision below is in conflict with *Lemon, Lynch* and *Allegheny* and the Supreme Court should grant certiorari.

## II.

## THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CREATES A CONFLICT AMONG THE CIRCUIT COURTS WITH REGARD TO DISPLAYS OF THE TEN COMMANDMENTS ON COURTHOUSE PREMISES.

The Eleventh Circuit by virtue of its per curiam affirmance of the Order of the District Court of January 13, 1993 has concluded that the content of the Ten Commandments is religious in nature and, when considered in its context, has the effect of endorsing religion in general and Christianity in particular and therefore violates the Establishment Clause. (District Court Order, App. II, p. 21a.)

The Tenth Circuit, with regard to a monument containing the Ten Commandments on city courthouse grounds, concluded that the monolith is primarily secular, and not religious in character; that neither its purpose or effect tends to establish religious belief. *Anderson v. Salt Lake City Corporation,* 475 F.2d 29, 34, *cert. denied,* 414 U.S. 879 (10th Cir. 1973).[4]

The Opinions of the Eleventh Circuit and the Tenth Circuit on very similar facts create a conflict between circuits which this Court should resolve, because, as noted in *Anderson, supra,* the Ten Commandments are erected in many public places across the United States. *Anderson v. Salt Lake City Corporation, id.* at 30.

An analysis of *Anderson v. Salt Lake City Corporation, supra,*

---

4. It should be noted with regard to *Anderson v. Salt Lake City* that the District Court cited the opinion of the District Court of Utah requiring that the Ten Commandments be removed but did not cite the opinion of the Court of Appeals for the Tenth Circuit which reversed the District Court of Utah. *See* 348 F. Supp. 1170 and contrast 475 F.2d 29.

reveals facts which would more likely persuade a reasonable observer of an endorsement of religion than a similar analysis of the facts here. First, the Commissioners of the City formally authorized the installation and maintenance of lighting equipment to illuminate and enhance the display at city and county expense. In addition, the monolith had other religious symbols representing the all seeing eye of God, the star of David and Christ or peace. The Tenth Circuit applied *Lemon v. Kurtzman, supra* and observed what many establishment clause opinions of the Supreme Court have noted, *i.e.*, that an ecclesiastical background does not necessarily mean an object is primarily religious in character; it can also have substantial secular attributes. *Anderson v. Salt Lake City,* 475 F.2d at 33. There, as here, one of the Plaintiffs acknowledged that the Ten Commandments is an affirmation of at least a precedent legal code. The Court went on to conclude that the panel was at once religious and secular, as indeed one would expect considering the role of religion in our traditions. *Anderson v. Salt Lake City,* 475 F.2d at 33.

It is important to note that in *Stone v. Graham, supra,* this Court invalidated a Kentucky state law requiring the posting of the Ten Commandments on public school classroom walls. In *Stone,* as in similar cases, this Court was especially vigilant because there was pro-active governmental conduct in the context of a compelled educational setting. *See Engel v. Vitale,* 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed.2d 601 (government required prayer) and *Abington School District v. Schempp,* 374 U.S. 203, 83 S. Ct. 1050, 10 L. Ed. 2d 844 (1963) (required daily bible readings). *Stone* is so distinguishable that it is inapplicable here and provides no guidance to lower courts for resolving the conflict created by the decision of the Tenth Circuit in *Anderson v. Salt Lake City, supra,* and the decision of the Eleventh Circuit in this case.

In view of the ubiquitous presence of the Ten Commandments at courthouses and other public buildings around the United States, the Supreme Court should grant certiorari. This Court should

consider the issue of whether the standard of the reasonable observer requires the removal of texts of the Ten Commandments from courthouses because of their religious nature dating to the most ancient eras, and in spite of their uncontested and profound place in the history, formation and precepts of the document the Court seeks to interpret, the United States Constitution.

## III.

## THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CONFLICTS WITH THE DECISION OF THIS COURT IN *VALLEY FORGE CHRISTIAN COLLEGE V. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC.* WITH REGARD TO CITIZEN STANDING AND TAXPAYER STANDING.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 70 (1982), this Court carefully addressed the requirements for standing under provisions of Article III of the Constitution limiting the judicial power of the United States to the resolution of cases and controversies. The Court assessed the authority of the courts to exercise judicial power under Article III of the Constitution with regard to citizen standing and taxpayer standing. The Court held "the exercise of judicial power which can so profoundly affect the lives, liberty and property of those to whom it extends, is therefore restricted to litigants who can show 'injury in fact' resulting from the actions which they seek to have the Court adjudicate." *Valley Forge, id.* at 473, 102 S. Ct. 759. This Court also observed that the " 'cases and controversies' language of Article III forecloses the conversion of courts of the United States into judicial versions of college debating forums." *Valley Forge, id.* at 473, 102 S. Ct. 759. There must be a demonstration of distinct and palpable injury that is likely to be redressed if the requested relief is granted. *Valley Forge,* 454 U.S. at 475, 102 S.

Ct. 760 citing *Gladstone Realtors v. Village of Bellwood*, 441 U.S. at 100, 99 S. Ct. 1608 and *Worth v. Seldin*, 422 U.S. 501, 95 S. Ct. 2206.

The decision of the Eleventh Circuit extending taxpayer standing to respondent Cunningham completely emasculates the requirements for taxpayer standing articulated in *Valley Forge, supra.* The decision does so by dismissing the fact that there has never been any public appropriation for the panel and relying on minimal maintenance by county inmates and their supervisors to confer standing. Taxpayer standing for Cunningham is based on the premise that these actions by a supervisor and Cobb County inmates who were housed, fed and transported by Cobb County at Cobb County's expense constituted the use of tax revenues. By dismissing the lack of even $1.00 of expenditure on the panel and seizing upon the indirect isolated activities of Cobb County inmates under Cobb County supervision, the District Court and the Eleventh Circuit circumvent the simple requirement that Mr. Cunningham sustain or be in immediate danger of sustaining some expenditure of tax money which the relief prayed for would prevent. In the absence of even $1.00 of expenditure appropriated for the panel and in the absence of at least some semblance of a showing that removing the panel would abate even one cent of expenditure for the housing, feeding, transportation and supervision of Cobb County inmates, there is absolutely no distinct and palpable financial injury resulting from the expenditure of Mr. Cunningham's tax payments that will be abated by removal of the Ten Commandments. The action of the District Court and the Eleventh Circuit constitutes to the utmost extent possible the addressing of a grievance that was not a direct dollars and cents injury with regard to tax expenditures. If standing exists at all, it must be found in some non-economic injury that distinguishes Mr. Cunningham from the population at large; none has been alleged or shown.

In extending citizen standing to respondent Harvey, the District Court and the Eleventh Circuit ran afoul of the requirements for citizen standing addressed in *Valley Forge, etc. v. Americans United, etc., supra.* With regard to citizen standing, this Court has required an injury suffered as a consequence of the alleged constitutional violation, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. *Valley Forge, supra.* Without some injury of some kind, economic or otherwise, there is no citizen standing. *Valley Forge, supra.*

The District Court and the Eleventh Circuit erroneously utilized the psychological consequence which may be produced by observation of conduct with which one disagrees to confer citizen standing on Respondent Harvey. The District Court found that Mr. Harvey is offended by the display of a religious symbol in a secular courthouse. (App. II, p. 10a.) Harvey insists that the panel sends the message to some of his clients (who would be third parties) who are neither Christian nor believers that their standing is unequal in the Cobb County Court system. (App. II, p. 10a.) The Court found specifically that Harvey has neither modified his behavior nor altered his law practice because of the display of the panel. (App. II, p. 10a.)[5]

The District Court and Eleventh Circuit circumvent the clearly articulated requirements of *Valley Forge* for finding standing by inappropriately invoking *Abington School District v. Schempp, supra.* In *Schempp,* the Court was dealing with a law that *required* bible reading in the public schools where children were *required* to attend. (Emphasis added.) The *Schempp* court found

---

5. Respondent Cunningham with respect to whom the Court found taxpayer standing likewise had not modified his behavior because of the display of the panel. (App. II, p. 10a.)

that children attending public schools and their parents, as opposed to children who were too young for public schools or had finished public schools or attended private schools or citizens in general, were directly affected by the prescriptive laws and practices against which their complaints were directed.

Here, the District Court and the Eleventh Circuit have relied on the psychological consequences which may be produced by observation of conduct with which the plaintiffs disagree to confer standing under Article III. This is precisely the circumstance which this Court has held insufficient to confer standing under Article III.

The District Court and the Eleventh Circuit in this case have ignored the unambiguous limitations on taxpayer and citizen standing set forth in *Valley Forge, etc. v. Americans United, etc.*, 454 U.S. at 488, 102 S. Ct. 767. They did so no doubt out of some conviction that enforcement of the Establishment Clause justifies special exceptions from the requirements that a Plaintiff allege distinct and palpable injury to himself that is likely to be redressed if the requested relief is granted. *Id.* at 488, 102 S. Ct. 767. The relief prayed for, based on the admissions of the Respondents Harvey and Cunningham, will not restore to them the slightest abridgement of use of the courthouse buildings because they have suffered none, and they failed to even suggest that they would endure or incur some abridgement in the future in the absence of relief. Likewise, the failure to identify even $1.00 of expenditure which would be alleviated by granting the relief prayed for shows that there is no palpable injury that is likely to be redressed if the requested relief is granted.

## IV.

## THERE IS A CONFLICT AMONG THE CIRCUIT COURTS IN THE APPLICATION OF *VALLEY FORGE CHRISTIAN COLLEGE V. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC.* WITH REGARD TO CITIZEN STANDING.

It should be noted that there has developed a conspicuous conflict between the Circuits regarding the application of the principles in *Valley Forge* to the requirements of citizen standing. In *Freedom from Religion Foundation v. Zielke,* 845 F.2d 1463 (7th Cir. 1980), the Seventh Circuit found that plaintiffs must, at the very least, alter their conduct or state unequivocally that future use of the public property will be foregone to manifest that non-economic injury, however slight, which distinguishes the individual from the general citizenry.

The decision of the Eleventh Circuit in this case, as well as in *ACLU v. Rabun County,* 698 F.2d 1098 (11th Cir. 1983) and *Saladin v. City of Milledgeville,* 812 F.2d 687 (11th Cir. 1989), dispensed with any requirement of a showing of an injury particular to the litigants. This conflict in the application of *Valley Forge, supra,* to the issue of citizen standing under Article III of the United States Constitution justifies certiorari.

## V.

## THE CASE INVOLVES EXTREMELY IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW INVOLVING THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT WHICH ARE UNSETTLED AND SHOULD BE SETTLED AND WHICH ARE HAVING A DEVASTATING IMPACT ON AMERICA'S SOCIAL AND CULTURAL WELL BEING.

To observe that Establishment Clause jurisprudence is

unsettled and contradictory and that the premier test for analysis under religion clause jurisprudence, *Lemon v. Kurtzman,* has come under severe criticism would be a most profound understatement. Since modern Establishment Clause jurisprudence commenced in *Everson v. Board of Education,* 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), where the Court articulated six examples of behavior proscribed by the Establishment Clause, the Court has charted an inconsistent and unpredictable course in an effort to fulfill the letter and spirit of the Establishment Clause. As legal scholars are prone to do when repeatedly confronted with issues of similar origin, the justices of the Supreme Court have sought to articulate tests for general application in lieu of case by case analysis. With regard to Establishment Clause jurisprudence, the pre-eminent test has been the *Lemon* test articulated in *Lemon v. Kurtzman, supra,* with its very familiar three prong test.

At the moment it was penned, the three part formula known as the *Lemon* test was in irreconcilable conflict with the long accepted constitutional traditions of this country and unavoidably at odds with a citizenry that Justice Douglas observed in *Zurich v. Claussen,* 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952) "are a religious people whose institutions presuppose a supreme being." *Zurich v. Claussen, supra* at 313, 96 L. Ed. 954, 72 S. Ct. 679.

As the public sphere in American life grew, and the *Lemon* test undermined an increasing number of activities of a religious people, the test was ignored, modified, or adorned with collateral analysis. For example, when the Court encountered the long standing practice of legislative prayer, *Lemon* was ignored. *Marsh v. Chambers,* 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983). In *Lynch v. Donnelly, supra,* and *Allegheny v. ACLU of Pittsburgh, supra,* there was a shift of focus to the second prong of *Lemon, i.e.*, the appearance of an endorsement or inhibition of religion. The difficulty with subjective criteria such as focusing on what something appears to be is demonstrated by the ever curious

outcome of allowing a creche display in *Lynch v. Donnelly, supra,* while banning a creche display and allowing a menorah display in *Allegheny.* Rather than attributing this curious outcome to careful factual analysis, with all due respect, the Justices of this Court should view it as the unflattering outcome of a subjective approach which focuses on what something appears to be, instead of inquiring into what was done and applying clearly articulated rules of law to the conduct. The latter is a function which the courts are peculiarly designed and equipped to undertake.

If the fulfillment of Establishment Clause jurisprudence pursuant to *Lemon v. Kurtzman* is the banishment of voluntary prayer at graduation, the proscription against truly voluntary prayer or other voluntary resort to religion in education in public schools and, as here, the removal of The Ten Commandments which have informed and shaped the Constitution and laws of the country, but more importantly the soul of its people, then the indictment of *Lemon* is not just that it is a bad test, but that it is rapidly facilitating the destruction of the Republic.

This Court may fairly ask just how this mainstay of modern jurisprudence has worked such mystery. Also, if not *Lemon,* what rules can be applied to preclude the establishment of religion and, as the Constitution provides with equal vigor, afford the people free exercise of religion. Cobb County, Georgia humbly suggests a means of doing so to this Court.

Since the advent of the *Lemon* test, the Establishment Clause, as applied to the state and local governments, school systems, social agencies and every other agency or subdivision of state or local government through the Fourteenth Amendment, has been interpreted in such a way as to completely eliminate the spiritual and moral foundation of our culture from public life in general, but education in particular. To state it another way, Establishment Clause jurisprudence in the modern era has just about prohibited

the American people from invoking "God" in any aspect of public life and thoroughly eliminated "God" from the classrooms of public schools. Ordering the removal of the Ten Commandments from an American courthouse epitomizes the ultimate consequences of true adherence to *Lemon*. So, as long as *Lemon* is the law of the land, it is appropriate to ask whether what the judiciary is doing pursuant to *Lemon* is good for the American people? The answer is a resounding no.

Coinciding with the modern interpretation of the Establishment Clause which has so secularized American public life and education, America has experienced a dramatic moral decline.[6] Moral decline does not mean an occasional failure of character, an occasional immoral act or immodest habit. These have always been a part of the human experience. Rather, moral decline means the glorification of fiscal excess and irresponsibility, dishonesty, drunkenness, promiscuity, meanness, perversion, and violence that has rifled through American society from Hollywood to Capitol Hill to Wall Street and right through Main Street. Whether jurists and lawyers want to admit it or not, the legal reasoning that has brought us to the point of removing the Ten Commandments from the courthouse has played a major role in our nation's moral decline. This is all the more tragic, since, as will be argued below, such an extreme and harmful interpretation of the Constitution is not necessary to fulfill the directives and purposes of the Establishment Clause and protect American citizens from the establishment of a religion by government or from being subjected to religious coercion in the shadow of other citizens' exercise of religion.

How has modern jurisprudence contributed to our country's

---

6. *See Book of Virtues,* William Bennett, (Simon Shuster 1994); *The Culture of Disbelief,* "How American Law and Politics Trivialize Religious Devotion", Stephen L. Carter, (BasicBooks 1993).

moral decline? While the Constitution and laws have been interpreted so as to eliminate the spiritual and moral foundation of our culture from public life and the public classroom, they have also been construed in such a way as to stretch tolerance to the point of creating a licentious society instead of a free society, a society where anything goes, rather than a society where people are free to engage in dialogue and pursue a livelihood and personal excellence within some reasonable bounds defining decent from indecent behavior.

The interaction of these trends in the law has been devastating. Popular culture bombards adults, not to mention impressionable young people, with unmitigated trash morning, noon and night. At the same time, religion, which in America certainly includes the Jewish religion, Catholic religion, Protestant religion, Islamic religion and others, all of which are instructive in the way people should behave towards themselves and others and elementary to the nurture of the human soul, is banned from public institutions including schools. Thus, society is deprived of essential tools for teaching what is right and wrong.

The judiciary in this country must realize that the strength of our society is ultimately defined by the higher philosophical, moral, and spiritual dimension of our people. As noted above, our philosophical, moral, and spiritual foundation has been provided by numerous religious traditions presupposing a supreme being. As stated in our founding documents, the Creator has endowed us with our cherished rights of liberty and we have trusted in our religious traditions to provide us with that degree of honesty, frugality, soberness, moderation, kindness and peacefulness necessary to live together in relative harmony.

The interpretation of the Constitution and laws of this country which has brought us to the brink of removing the Ten Commandments from a courthouse must be revisited. We must

find a way to preclude the establishment of religion by government and to protect the people's freedom to invoke religion, which is the means by which they, *not government,* maintain the spiritual or moral fabric of our country.

This does not mean that government at any level should be allowed to favor any particular religion or coerce a prayer or profession of faith or any other religious ritual. Religious liberty is a fundamental American liberty, and the marriage of that liberty with a unique Establishment Clause has made America one of the few countries in the world where religion has been all but eliminated as a basis for heated conflict, not to mention war.

America's problem today is not the establishment of any religion. Rather, the judicial branch of our government has been allowed to coerce the American people into an amoral straight jacket which has begun to tear our society apart at the seams. No society, nor any individual, can navigate the stormy seas of life for very long without a spiritual or moral compass and rudder. In this regard, religion serves a secular purpose. American's effort to do without religion over the last 30 years has not been very successful. Many individuals, particularly those without the money to buy relief from the hardships of demoralized schools, teenage pregnancy, single parenthood, divorce, drug abuse and other social ills, already have suffered greatly. Through this Petition for Writ of Certiorari, Cobb County, Georgia urges the United States Supreme Court to take this opportunity to confront the stark reality of just where we are as a people.

It is incumbent upon Petitioner in making such a bold request to suggest to this Court a judicial mechanism for implementing the Establishment Clause and the Free Exercise Clause of the First Amendment which is true to the letter and spirit of these revered clauses of the Bill of Rights.

As noted above, the *Lemon* test has been the vehicle on which the Establishment Clause has run rough shod over the Free Exercise Clause. While asserting the vitality of *Lemon,* this Court appears to be divided between an endorsement test (*Lynch* and *Allegheny*) and some semblance of a coercion test (*Lee v. Weissman, supra*).

The endorsement test articulated by Justice Blackmun writing for the Court in *Allegheny* is hopelessly subjective, and lends itself to the rule of judges of varying social, political, religious and cultural disposition, rather than the rule of law. It focuses on what appears to be occurring rather than whether the government is or is not prescribing matters with respect to religion.

A coercion test, particularly as defined and relied on in the decision of *Lee v. Weissman, supra,* does not come close to being a rule which will effectively police government with regard to laws or acts respecting the establishment of religion. Moreover, a coercion test as defined and applied in *Lee v. Weissman* clouds a distinction which the judiciary in this country must always make if it is to lend equal weight to the Establishment Clause and the Free Exercise Clause. That distinction is between real government prescription or coercion respecting religion as opposed to the personal offense sometimes experienced by one who exercises his constitutionally protected prerogatives regarding religion in one way while observing another exercising those prerogatives in a different way.

There is a way to establish rules and set legal precedents which will implement the Establishment Clause and the Free Exercise Clause in equal degree. The point of departure is to examine the simple language of the two different phrases concerning religion in the First Amendment: "Congress shall make no law respecting the establishment of religion or abridging the free exercise thereof." Both clauses direct prohibitions at

government, *not* the people. Government is prohibited from establishing religion and government is prohibited from abridging the free exercise thereof by the people. These clauses invite the very undertaking for which the judiciary is most suited. That is making a factual inquiry into what has occurred in any given situation and applying these two simple constitutional directives to that behavior. Where a religious act or display initiates with or from the citizens, it must be afforded free exercise. But, a practice or policy respecting religion, including agnostic or atheistic practices or policies, which initiate with or from government or its agents, should be prohibited as a law or activity respecting the establishment of religion. This is not to suggest a coercion test, though coercion and its alleviation may well come into play in a context where one citizen complains of the religiosity of other citizens, particularly in a public setting. However, the removal of real coercion can be achieved in American public life without squelching the exercise of religion by those citizens to whom it matters.

Such a new interpretation is imperative not only to carry out the letter and intent of the Constitution but to allow the people of this country the religious freedom they need to restore the moral compass, keel and rudder that has made this country great. Without a new interpretation of the Establishment Clause and the Free Exercise Clause, efforts to address the unraveling of our social fabric will be limited to aspiritual and irreligious means and will be an exercise in futility. Without such a renewal of religious freedom, the Republic will not long last. Of this, the Petitioner and counsel for the Petitioner are absolutely certain.

## CONCLUSION

The Petitioner Cobb County, Georgia respectfully submits there are five reasons for granting a Writ of Certiorari. First, the decision of the Eleventh Circuit conflicts with the decisions of this

Court in *Lemon v. Kurtzman, Lynch v. Donnelly,* and *Allegheny v. ACLU of Pittsburgh.* Secondly, the decision of the Eleventh Circuit creates a conflict among the circuit courts with regard to displays of the Ten Commandments at courthouses, a reoccurring situation across the country. Third, the decision of the Eleventh Circuit is in conflict with the decision of this Court regarding citizen and taxpayer standing in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., supra.* Fourth, there is a conflict among the Circuit Courts in the application of *Valley Forge* to citizen standing.

*Finally,* this case involves extremely important questions of constitutional law involving the Establishment Clause and the Free Exercise Clause of the First Amendment which are unsettled and should be settled and which are having a devastating impact on America's social and cultural well being and the religious freedom of the people.

For all these reasons, the Petitioner respectfully requests that this Court grant a Writ of Certiorari, entertain the briefs and arguments of counsel and consider the issues raised in this Petition.

Respectfully submitted,

CHARLES B. TANKSLEY
*Counsel of Record*
BARNES, BROWNING,
TANKSLEY & CASURELLA
166 Anderson St., Suite 225
Marietta, Georgia 30060
(404) 424-1500

JERRY L. GENTRY
COBB COUNTY
LAW DEPARTMENT
100 Cherokee Street, Suite 595
Marietta, Georgia 30090-9689
(404) 528-4000

FRED D. BENTLEY, JR.
BENTLEY, BENTLEY & BENTLEY
260 Washington St.
Marietta, Georgia 30060
(404) 422-2300

*Attorneys for Petitioner*
*Cobb County, Georgia*

## APPENDIX I — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 31, 1994

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8194

D. C. Docket No. 1:92-cv-45-MHS

BRUCE S. HARVEY, and JAMES D. CUNNINGHAM,

Plaintiffs-Appellees,

versus

COBB COUNTY, GEORGIA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

(January 31, 1994)

Before BLACK, Circuit Judge, FAY*, Senior Circuit Judge, and UNGARO-BENAGES**, District Judge.

PER CURIAM:

---

* See Rule 34-2(b), Rules of the United States Court of Appeals for the Eleventh Circuit.

** Honorable Ursula Ungaro-Benages, U.S. District Judge for the Southern District of Florida, sitting by designation.

*Appendix I*

The granting of injunctive relief is affirmed for the reasons set forth in the ORDER of the district court under date of January 13, 1993.

Affirmed.

## APPENDIX II — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION FILED JANUARY 13, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
1:92-cv-45-MHS

BRUCE S. HARVEY and JAMES D. CUNNINGHAM,

Plaintiffs,

v.

COBB COUNTY, GEORGIA,

Defendant

ORDER

This case requires the Court to decide whether a framed panel of the Ten Commandments and the so-called Great Commandment displayed in a county courthouse building violates the Establishment Clause of the First Amendment of the United States Constitution. That decision affects not only the litigants in this case but more broadly our concept of full religious freedom — to believe or not to believe, to participate or not to participate, as one pleases — and whether we truly insist, as did Thomas Jefferson in 1802, that there must be a "wall of separation between church and State."

*Appendix II*

For the reasons stated below, the Court concludes that the Ten Commandments and the Great Commandment are essentially religious texts in the Jewish and Christian traditions and that the display standing alone in a county courthouse violates the Establishment Clause of the First Amendment of the United States Constitution. This order, however, will be stayed for four months to give defendant an opportunity to include the panel in a larger display of non-religious, historical items, which may bring it within constitutional parameters.

To those who have asked the Court by phone calls and letters "to save the Ten Commandments," the Court points out that the Ten Commandments are not in peril. They may be displayed in every church, synagogue, temple, mosque, home, and storefront. They may be displayed on lawns and in corporate board rooms. Where this precious gift cannot, and should not, be displayed as a religious text is on government property. For any erosion of the Bill of Rights — restraints voluntarily imposed by the majority to protect the rights of the minority — will inevitably produce prejudice and persecution.

In January 1992, plaintiffs[1] brought suit against defendant Cobb County, seeking declaratory and injunctive relief for the County's acquisition, installation, display, and maintenance of a framed panel of the Ten Commandments and the Great Commandment displayed in the Cobb County State Court Building. Plaintiffs contend that the displayed panel violates the First Amendment of the United States Constitution[2] and the

---

1. Plaintiff Bruce Harvey is Jewish and plaintiff James Cunningham is an agnostic.

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. amend. I, cl. 1.

comparable provision of the Georgia Constitution[3] and also violates their civil rights under 42 U.S.C. §§ 1983, 1988. In April 1992, the Court consolidated the preliminary injunction hearing with the trial of this matter under Federal Rule of Civil Procedure 65(a)(2). Based on the evidence at trial and the parties' proposed findings of fact and conclusions of law, the Court enters the following findings of fact and conclusions of law under Federal Rule of Civil Procedure 52(a).

## I. FINDINGS OF FACT

1. The display in this case is a three-by-five-foot framed panel that hangs alone in an alcove above a marble bench near the Traffic Court courtrooms and the Clerk's Office on the first floor of the Cobb County State Court Building, which is part of the Cobb County Judicial Complex.

2. The panel contains the following language:

THE TEN COMMANDMENTS

1. Thou shalt have no other gods before me.
2. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth: thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of

---

3. Ga. Const. art. 1, § 2, ¶ 7.

them that hate me; and shewing mercy unto thousands of them that love me, and keep my commandments.

3. Thou shalt not take the name of the LORD thy God in vain; for the LORD will not hold him guiltless that taketh his name in vain.

4. Remember the Sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work: but the seventh day is the Sabbath of the LORD thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates: for six days the LORD made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the LORD blessed the Sabbath day, and hallowed it.

5. Honor thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee.

6. Thou shalt not kill.

7. Thou shalt not commit adultery.

8. Thou shalt not steal.

9. Thou shalt not bear false witness against thy neighbor.

10. Thou shalt not covet thy neighbor's house, thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is thy neighbor's.

---

Jesus said: 1. Thou shalt love the LORD thy GOD with all thy heart, and with all thy soul, and with all thy mind. 2. Thou shalt love thy

> neighbor as thy self. On these two commandments hang all the law and the prophets.

3. At trial, Rabbi Shalom Lewis of Synagogue Etz Chaim in Cobb County testified that

> the "Ten Commandments" that appears parallels the Jewish version of the "Ten Commandments", which comes, of course, from the Bible, the Old Testament, as referred to within the Christian community. The Sixth Commandment, though, is a mistranslation. The translation here says "Thou shalt not kill." That is not what the text says in the original Hebrew, which says "Thou shalt not murder."
>
> The second part of the text, . . . the statements attributed to Jesus, . . . appear in the New Testament, . . . but . . . originally appear in the Bible in the Five Books of Moses. The first quote, . . . "You shall love the Lord your God with all your heart," is one of the fundamental Jewish creeds found in Deuteronomy. The second half of that, which is the quote "Love your neighbor as yourself," comes from Leviticus, Chapter 19. And the third part . . . is actually a paraphrase borrowed from Rabbinic literature by Rabbi Hillel, which precedes even the birth of Jesus.

(Trial Tr. at 74-75.)

4. Rabbi Lewis's unchallenged testimony was supported by

the testimony of The Reverend James Houston Wheeler, an ordained minister of the United Church of Christ. Reverend Wheeler also testified that, in the Christian tradition, Jesus is considered the Messiah, the Christ, a fulfillment of a promise made in the Bible or Old Testament, and his words are the words of God. (Trial Tr. at 90.)

5. Leif Carter, lawyer and professor of political science at the University of Georgia, and George Beggs, dean of the School of Arts and Behavioral Sciences and professor of political science at Kennesaw State College, both testified that the Ten Commandments are one of many sectarian and non-sectarian influences on the formation of Western law in general and the United States Constitution in particular. Examples of other influences are the Code of Hammurabi, the Justinian Code, and the philosophies of Plato, St. Augustine, and St. Thomas Aquinas.

6. The following persons testified about the panel itself: William Cox, Custodian Coordinator of Cobb County; Mack Henderson, Cobb County Manager; Herbert McCollum, former Commissioner of Cobb County; and Conley Ingram, attorney and former Justice of the Supreme Court of Georgia. They stated that the panel was donated to Cobb County by the Gardner family sometime before 1939. Between 1939 and 1967, the panel hung on the outside wall of the old Cobb County Courthouse. In 1967, the panel, along with other items, was moved from the old Courthouse to its present location by Cobb County inmates, who are housed, fed, and transported by Cobb County. During the past twenty-five years, the panel has, on several occasions, been

dusted by a night cleaning crew consisting of Cobb County inmates and a supervisor employed by Cobb County. The crew once removed and then replaced the panel to clean the heavy buildup of nicotine around and behind the panel.

7. On July 15, 1991, plaintiffs, through their counsel, wrote to Dr. Phillip Secrist, Chairman of the Cobb County Board of Commissioners, requesting removal of the panel on the ground that its display in the State Court Building violated the Establishment Clause.

8. On July 19, 1991, Mack Henderson, Cobb County Manager, responded to the letter, stating that the Board of Commissioners was against the removal of the panel and had recently voted to support the continued display of the panel in the State Court Building.

9. On January 6, 1992, plaintiffs brought the present action against Cobb County and moved for a temporary restraining order. On January 9, 1992, following a hearing, the Court denied plaintiffs' motion for a temporary restraining order, expressing concern about plaintiffs' standing to maintain this action. The trial of this action, advanced and consolidated with the hearing of plaintiffs' motion for a preliminary injunction under Rule 65(a)(2), was held on April 23, 1992.

10. Plaintiff Harvey is employed as a criminal defense attorney with an office in Fulton County, Georgia, in the City of Atlanta, and has a state-wide practice. During the past two years, approximately fifteen percent of Harvey's practice has been in Cobb County, and

approximately five percent of this has been in State Court. During the past year, Harvey has appeared in five or six cases in Traffic Court and presently has one case pending in Traffic Court. Harvey has seen or passed by the panel each time that he has been in the State Court Building. He neither avoids nor seeks out the panel, though he is often near the panel, talking to clients, witnesses, and other attorneys.

11. As an attorney, Harvey is offended by the display of "a religious symbol . . . in a secular courthouse." (Tr. Hr'g Pls' T.R.O. Mot. at 17-18.) Harvey believes that the display of the panel sends the message to some of his clients, those who are neither Christians nor "believers," that "they are starting unequal" in the Cobb County court system. (*Id.* at 18.) Harvey has neither modified his behavior nor altered his law practice because of the display of the panel.

12. Plaintiff Cunningham lives in the city of Smyrna in Cobb County and is a resident property owner and taxpayer in Cobb County. During the past three years, he has entered the State Court Building as a defendant and as a juror approximately twenty times and has seen the panel many times, often during his wanderings through the Judicial Complex.

13. Cunningham views the panel as "purely religious" and Cobb County's display of it as indicative of the influence of religion in general and Christianity in particular on "our government" and court system. (Trial Tr. at 42-43.) He has not modified his behavior because of the display of the panel.

*Appendix II*

## II. CONCLUSIONS OF LAW

### A. *Standing*

The threshold issue is whether plaintiffs have standing to challenge Cobb County's display of the panel in the State Court Building. Harvey contends that he has standing as a citizen; Cunningham contends that he has standing as a citizen and a taxpayer.

Under Article III of the United States Constitution, the judicial power is limited to the resolution of "cases" or "controversies." *Allen v. Wright,* 468 U.S. 737, 750 (1984); *see Valley Forge Christian College v. Americans United for Separation of Church and State Inc.,* 454 U.S. 464, 471 (1982); *Saladin v. City of Milledgeville,* 812 F.2d 687, 690 (11th Cir. 1987). "As part and parcel of the case or controversy requirement, a litigant must have 'standing' before he can bring a lawsuit in federal court." *Id.* (citations omitted).

Standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin,* 422 U.S. 490, 498 (1975) (quoting *Barrows v. Jackson,* 346 U.S. 249, 255-56 (1953)). These constitutional limitations require

> the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

*Valley Forge,* 454 U.S. at 472 (citations omitted). Although spiritual or psychological harm that results from contact with the offensive conduct or object is not enough to establish injury for purposes of standing, non-economic harm, regardless of how small, is enough as long as the injury is a direct, personal one. *Id.* at 484-87; *United States v. SCRAP,* 412 U.S. 669, 686-89 (1973).

The prudential limitations of standing require consideration of three issues:

> (1) whether the plaintiff's complaint falls within the zone of interests protected by the statute or constitutional provision at issue; (2) whether the complaint raises abstract questions amounting to generalized grievances which are more appropriately resolved by the legislative branches; and (3) whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties.

*Saladin,* 812 F.2d at 690. Nonetheless, the essence of standing is "whether the plaintiff has alleged 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions. . . .' " *Id.* at 690 (quoting *Baker v. Carr,* 369 U.S. 186, 204 (1962)).

1. *Citizen Standing*

Plaintiff Harvey's law practice in Cobb County requires him to enter the State Court Building and, because of the location of the

panel, brings him into direct contact with the panel. As *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), and two subsequent Eleventh Circuit cases, *American Civil Liberties Union v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1108 (11th Cir. 1983), and *Saladin v. City of Milledgeville*, 812 F.2d 687, 690 (11th Cir. 1989), make clear, this "unwelcome" direct contact with the offensive object is enough to establish injury for purposes of standing.

In *Abington*, the Supreme Court invalidated laws that required Bible reading in the public schools. 374 U.S. at 226. Plaintiffs were children who attended the schools in question and their parents. The Court noted:

> It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. . . . The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain.

*Id.* at 224 n.9 (citations omitted). Thus, "plaintiffs . . . had standing . . . because [they] were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 486 n.22.

In *Rabun County*, the Eleventh Circuit held that two citizens of Georgia had standing to challenge the display of a large illuminated cross located in Black Rock Mountain State Park in Georgia and visible from miles around. 698 F.2d at 1108. The court noted that one plaintiff, who operated a summer camp which

looked out on the cross, was "injured" because he was forced to view the cross continually while on the summer camp grounds. *Id.*

In *Saladin,* plaintiffs, who lived in and around the city of Milledgeville, challenged the City's use of the word "Christianity" on the city seal. The Eleventh Circuit held that these plaintiffs, like those in *Rabun County* and *Schempp,* also had standing because they "come into direct contact with the offensive conduct." 812 F.2d at 692. The court noted that "at least three of the plaintiffs regularly receive correspondence on city stationery bearing the seal from the City's Water Works, and at least two of the plaintiffs are active in civic organizations which received proclamations from the Mayor's office embossed with the seal and were present at the presentation of the proclamations." *Id.; accord Harris v. City of Zion,* 927 F.2d 1401 (7th Cir. 1991)

Like the plaintiffs in *Schempp, Rabun County,* and *Saladin,* plaintiff Harvey comes into direct contact with the alleged offensive conduct, and Harvey's standing to bring this action is not predicated on avoidance of the conduct or assumption of a special burden. Like the plaintiffs in *Schempp* who stayed in school, the plaintiff in *Rabun County* who continued to operate his summer camp, and the plaintiffs in *Saladin* who remained in Milledgeville, Harvey is not required to change his life — to cease practice in the State Court of Cobb County or to avoid the panel while in the State Court Building — to establish injury for purposes of standing. *Cf. Freedom From Religion Foundation Inc. v. Zielke,* 845 F.2d 1463, 1469 (7th Cir. 1988) (appellant lacked standing because she had not demonstrated that "she lives anywhere near Cameron Park [where the challenged monument was displayed], that the monument is visible in the course of her normal routine, or that her usual driving or walking routes take her past the park"). Here it is enough that Harvey's job on occasion brings him into direct

contact with the panel, and this sets Harvey apart from the general public and shows that his grievance is not "shared in substantially equal measure by all or a large class of citizens." *Warth*, 422 U.S. at 499. Accordingly, the Court concludes that Harvey has standing as a citizen to bring this action.

2. *Taxpayer Standing*

The central case on the issue of taxpayer standing is *Frothingham v. Mellon*, 262 U.S. 447 (1923). *Frothingham* limited the standing of federal taxpayers to challenge the constitutionality of federal expenditures, but left unchanged the standing of municipal taxpayers to sue to enjoin an illegal use of a municipal corporation's public funds. "The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate." *Id.* at 486. The Supreme Court's recognition of the standing of municipal taxpayers has been affirmed by several lower courts. *See, e.g., Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, 1469-70 (7th Cir. 1988); *Gwinn Area Community Schools v. State of Michigan*, 741 F.2d 840, 844 (6th Cir. 1984); *Ridgefield Women's Political Caucus, Inc. v. Fossi*, 458 F. Supp. 117, 120 n.3 (D. Conn. 1978).

To establish standing to bring this action as a municipal taxpayer, Cunningham must show that he was or is a Cobb County resident taxpayer and that Cobb County has used or will use tax money on the acquisition, installation, preservation, maintenance, or display of the panel. *See Flast v. Cohen*, 392 U.S. 83, 102 (1968); *Zielke*, 845 F.2d at 1469-70. The parties do not dispute that Cunningham was and is a Cobb County resident property owner and taxpayer, but do dispute whether Cobb County has expended tax money on the panel.

*Appendix II*

Cobb County contends that it neither has used nor ever will use tax money on the panel and stresses that the panel was a gift donated to Cobb County by the Gardner family before 1939. The facts, however, show that in 1967 the panel was moved from the old Courthouse to its present location by Cobb County inmates. Further, the panel has been dusted by a night cleaning crew consisting of Cobb County inmates and a supervisor employed by Cobb County several times during the past twenty-five years. On one occasion the panel was taken down and replaced by the crew after removing the heavy buildup of nicotine on the panel. These actions by a supervisor and by Cobb County inmates, who were housed, fed, and transported by Cobb County at Cobb County's expense, constitute the use of tax revenues, however small and indirect, on the panel. Accordingly, the Court concludes that Cunningham has standing to bring this action as a Cobb County taxpayer.[4]

B. *Establishment Clause*

The modern test for determining whether a government act violates the Establishment Clause of the First Amendment was articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): A statute or practice that touches upon religion, "first, . . . must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, . . . must not foster 'an excessive entanglement with religion.' " *Id.* at 612-13 (citations omitted). "State action violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

---

4. Since the Court concludes that Cunningham has standing as a municipal taxpayer, the Court need not reach Cunningham's claim to citizen standing.

*Appendix II*

In recent years, beginning with *Lynch v. Donnelly,* 465 U.S. 668 (1984), where the Court upheld the display of a creche as part of an overall holiday display, the Court has emphasized and elaborated upon the second prong of the *Lemon* test — that the principal or primary effect of the government action must not be either to advance or inhibit religion. Justice Blackmun, writing for a divided Court in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter,* 109 S. Ct. 3086 (1989), reviewed the Court's decision in *Lynch* and distilled the relevant constitutional principles: "[T]he government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." 109 S. Ct. at 3103. "The prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred.*' " *Id.* at 3101 (quoting *Wallace v. Jaffree,* 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). " 'The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.' " *Id.* at 3107 (quoting *Larson v. Valente,* 456 U.S. 228, 244 (1982)). Nor can government favor religion over non-religion. *Id.* at 3101; *Texas Monthly, Inc. v. Bullock,* 109 S. Ct. 890, 906 (1989) (White, J., concurring in judgment).

In *Allegheny,* the Court examined two displays on public property in downtown Pittsburgh, one of a creche standing alone in a courthouse staircase and one of a menorah displayed as part of a larger winter holiday exhibit in front of the City-County building. The creche used words in its portrayal of the nativity scene — the angel in the creche said "Glory to God in the Highest!" 109 S. Ct. at 3103. By contrast, the winter holiday exhibit included a sign with the words "Salute to Liberty" placed below the Christmas tree. The

Court concluded that the creche display violated the Establishment Clause and the menorah display did not. *Id.* at 3105.

Although the Court in *Allegheny* was sharply divided,[5] it was unified in its approach, focusing on the content and context of each display. *Id.* at 3103. Justice Blackmun's analysis in *Allegheny* exemplifies this approach. In evaluating the creche display, Justice Blackmun first focused on the content of the creche, noting that it sends an unmistakable religious message: "Glory to God because of the birth of Jesus. This praise to God in Christian terms is indisputably religious — indeed sectarian — just as it is when said in the Gospel or in a church service." *Id.* at 3103 .

Justice Blackmun then focused on the physical setting and location of the displays. First, he noted that "the creche stands alone: it is the single element of the display on the Grand Staircase." *Id.* at 3104. From this he concluded that "nothing in the context of the display detracts from the creche's religious message." *Id* . at 3103-04. Second, he noted that the creche "sits on the Grand Staircase, the 'main' and 'most beautiful part' of the building that is the seat of county government." *Id.* at 3104. He concluded that "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government." *Id.* In evaluating the menorah display, Justice Blackmun concluded that the Christmas tree and the sign saluting liberty and the holiday season neutralized the religious dimension of the menorah display and emphasized its secular dimensions. *Id.* at 3113-15.

---

5. Only Justices Blackmun and O'Connor voted to find the creche display unconstitutional and the menorah display constitutional. Three Justices, Brennan, Marshall, and Stevens, voted to find both the creche and the menorah unconstitutional. Finally, three Justices, Rehnquist, Scalia, and Kennedy, voted to find both displays constitutional.

## *Appendix II*

### 1. *The Content of the Display*

In evaluating the constitutionality of the display of this panel in the Cobb County Judicial Complex, this Court must likewise consider the content and context of the panel to determine whether it "has the effect of endorsing or disapproving religious beliefs." *Allegheny,* 109 S. Ct. at 3103. The content of the panel, the Ten Commandments and the so-called Great Commandment attributed to Jesus of Nazareth, is undeniably religious. As Rabbi Lewis, Reverend Wheeler, and Professors Carter and Beggs all testified, the Ten Commandments are an integral part of the Jewish and Christian traditions, appearing in the Book of Exodus in the Bible or Old Testament.[6]

In addition, the summary of the Ten Commandments, the Great Commandment, which appears in the New-Testament[7] and which is included at the bottom of the panel, emphasizes the religious nature of the panel and its association with the Christian tradition. As Reverend Wheeler testified, in the Christian tradition, Jesus is considered the Messiah, the Christ, a fulfillment of a promise made in the Bible or Old Testament, and Jesus' words are the words of God. Further, the panel's association with the Christian tradition is accentuated by the language of the Sixth Commandment prohibiting killing. As Rabbi Lewis testified, this version of the Sixth Commandment is a mistranslation of the original Hebrew, which prohibits murder, and frequently appears in Christian versions of the Ten Commandments.

Nonetheless, Cobb County argues that the content of the panel

---

6. *Exodus* 20:1-17; *cf. Deuteronomy* 5:6-21.

7. *Matthew* 22:34-40; *Mark* 12-28-34; *Luke* 10:25-28.

is not religious: the display merely represents a recognition of a "historical, jurisprudential cornerstone of American legal significance." (Def.'s Resp. to Pls' T.R.O. Mot. at 10.) This argument was considered and rejected by the Supreme Court in *Stone v. Graham*, 449 U.S. 39 (1980). There the Court held that the display of a copy of the Ten Commandments on the walls of public classrooms violated the Establishment Clause. The Court reached its decision despite the state legislature's requirement that each copy of the Ten Commandments be printed with the words "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common law of the United States." *Id.* at 41.

The Court in *Stone* concluded that the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Id.* (footnote omitted). As Rabbi Lewis, Reverend Wheeler, and Professors Carter and Beggs all concluded, these Biblical texts, the Ten Commandments and the Great Commandment, are undeniably religious and to deny this is to deny their essence. "Surely the place of the Bible as an instrument of religion cannot be gainsaid. . . ." *Abington*, 374 U.S. at 224. Thus, the Court concludes that the content of these documents is religious in nature. *Accord Anderson v. Salt Lake City*, 348 F. Supp. 1170 (D. Utah 1972).

2. *The Context of the Display*

*Allegheny* also mandates a close examination of the context of the display to determine whether its overall effect endorses religion. 109 S. Ct. 3103. The Court must consider several factors, the most important of which are the location and physical setting of

the display. In *Allegheny*, the Court found the display of the creche unconstitutional since the creche stood alone on the Grand Staircase of the County Courthouse building. *Id.* at 3104; *see also Chabad-Lubavitch v. Miller*, 976 F.2d 1386 (11th Cir. 1992).

Here, too, the display stands alone in the alcove, and there are no countervailing secular passages or symbols. "[N]othing in the context of the display detracts from the [panel's] religious message." *Allegheny*, 109 S. Ct. at 3103-04. Moreover, the display is located in the Cobb County State Court Building, a seat of judicial authority in the county. Although the panel is not located in the most prominent part of the building, it is, nonetheless, located high on the wall, above a marble bench, near the Clerk's Office and the Traffic Court courtrooms. "No viewer could reasonably think that it occupies this location without the support and approval of the government." *Id.* The Court concludes that the panel, when considered in its context, has the effect of endorsing religion in general and Christianity in particular and therefore violates the Establishment Clause.[8]

## III. CONCLUSION

Professor Leif Carter stated that he "would not object to having the plaque on the wall exactly as it is written as long as it were part of a display to try to include all the various moral, historical, and political influences on our legal system" such as the Code of Hammurabi, the Code of Justinian, and passages from early English cases. (Trial Tr. at 121-23.) The Court agrees with Professor Carter that an appropriate educational display that

---

8. Because the Court concludes that Cobb County's display of the panel fails to satisfy the second prong of the *Lemon* test, the Court need not reach the first and third prongs.

includes the panel would pass constitutional muster. As Justice Stevens has noted:

> [A] carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does "the permanent erection of a large Latin cross on the roof of city hall." Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious figures, however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would to exclude religious paintings by Italian Renaissance masters from a public museum.

*Allegheny,* 109 S. Ct. at 3132 (Stevens, J., concurring in part and dissenting in part) (citations and footnote omitted).

Accordingly, the Court GRANTS plaintiffs' motion for injunctive relief, but STAYS this order for four months to give Cobb County, in consultation with plaintiffs, an opportunity to develop an educational display including the Ten Commandments panel. *See Chabad-Lubavitch,* 976 F.2d at 1395-96 (Kravitch, J., concurring in part and dissenting in part). To this end, the Court

*Appendix II*

DIRECTS the parties to meet within fifteen days of the date of this order and to file a joint report to the Court within ninety days of the date of this order. The Court suggests that defendant employ Professor Leif Carter as a consultant for his assistance and recommendations in the development of a display.

If Cobb County fails to develop an appropriate display approved by the Court, the panel must be removed.

IT IS SO ORDERED, this 13th day of January, 1993.

s/ Marvin H. Shoob
Senior Judge Marvin H. Shoob
United States District Court
Northern District of Georgia

## APPENDIX III — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING STAY FILED MARCH 14, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8194

BRUCE S. HARVEY and JAMES D. CUNNINGHAM,

Plaintiffs-Appellees,

versus

COBB COUNTY, GEORGIA

Defendant-Appellant.

Appeal from the United States District Court for the
*Northern District of Georgia*

ORDER:

(√) The motion of *Cobb County, Georgia* for (√) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of *Cobb County, Georgia* for ( ) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme

*Appendix III*

Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of *Cobb County, Georgia* for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

IT IS ORDERED that the motion of *Cobb County, Georgia* for a further stay of the issuance of the mandate is DENIED.

s/ Susan Black
UNITED STATES CIRCUIT JUDGE

## APPENDIX IV — ORDER OF THE UNITED STATES DISTRICT COURT GRANTING STAY PENDING APPEAL TO THE ELEVENTH CIRCUIT DATED MARCH 8, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
1:92-cv-0045-MHS

BRUCE S. HARVEY and JAMES D. CUNNINGHAM,

Plaintiffs,

v.

COBB COUNTY, GEORGIA,

Defendant

ORDER

This action is before the Court on the parties' joint report and motion to remove stay, on defendant's motion to suspend injunction pending appeal, and on plaintiffs' motion for attorneys' fees. The Court GRANTS the parties' motion to remove the four month stay in the Court's January 13, 1993 Order [#16-1] and, for the reasons given in defendant's motion, GRANTS defendant's motion to suspend the injunction pending the appeal of this action to the Eleventh Circuit [#18-1]. Fed. R. Civ. P. 62(c). The Court DEFERS ruling on plaintiffs' motion for attorneys' fees until after the appeal of this action [#15-1].

IT IS SO ORDERED, this 8th day of March, 1993.

*Appendix IV*

s/ Marvin H. Shoob
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

## APPENDIX V — EXCERPTS FROM TRIAL TRANSCRIPT OF APRIL 23, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DOCKET NUMBER
1:92-CV-45-MHS

ATLANTA, GEORGIA
APRIL 23, 1992
10:15 A.M.

BRUCE HARVEY, ET AL.,

PLAINTIFFS,

VS.

COBB COUNTY, GEORGIA,

DEFENDANT

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MARVIN H. SHOOB
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: MARSHALL COHEN
1402 BANK SOUTH BLDG.
ATLANTA, GA. 30303

*Appendix V*

MICHAEL HAUPTMAN
34 PEACHTREE ST., NE
ATLANTA, GA. 30303

GERALD R. WEBER
233 MITCHELL ST., SW
ATLANTA, GA. 30303

FOR THE DEFENDANT: JERRY L. GENTRY
CAROL A. CALLAWAY
100 MARIETTA STA. WALK
SUITE 350
MARIETTA, GA. 30060

RUFUS L. HIXON
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
1914 U.S. DISTRICT COURTHOUSE
ATLANTA, GEORGIA 30303
(404) 331-3723

* * *

[COMMENCING AT PAGE 21]: COURTROOM.

MR. WEBER: THANK YOU. WE CALL WILLIAM COX.

THE CLERK: MR. COX, WOULD YOU PLEASE COME FORWARD AND STAND RIGHT HERE. RAISE YOUR RIGHT HAND AND TAKE — DO YOU WISH TO BE AFFIRMED?

THE WITNESS: NO; I'LL TAKE THE OATH.

*Appendix V*

THE CLERK: DO YOU SOLEMNLY SWEAR THE TESTIMONY YOU SHALL GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: I DO.

THE CLERK: HAVE A SEAT IN THE WITNESS STAND, AND STATE YOUR FULL NAME FOR THE RECORD, PLEASE.

THE WITNESS: WILLIAM W. COX.

— — —

WILLIAM W. COX

CALLED AS A WITNESS BY THE PLAINTIFFS, AFTER HAVING FIRST BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. WEBER:

Q. MR. COX, WHAT IS YOUR POSITION WITH COBB COUNTY?

A. CUSTODIAN CO-ORDINATOR.

Q. WHAT DO YOU DO AS A CUSTODIAN CO-ORDINATOR?

BEST AVAI

*Appendix V*

A. I'M IN CHARGE OF CUSTODIAL SERVICES FOR THE COUNTY BUILDINGS.

[22] Q. DOES THAT INCLUDE THE STATE COURT BUILDING?

A. RIGHT.

Q. DOES THAT INCLUDE THE AREA THAT IS COVERED — THAT THE "TEN COMMANDMENTS" IS IN?

A. RIGHT, YES; IT DOES.

Q. IS THERE A NIGHT CREW THAT'S RESPONSIBLE FOR CLEANING THAT AREA?

A. YES; THERE IS.

Q. AND WHO IS IN THE NIGHT CREW?

A SUPERVISOR WITH INMATE LABOR, AND THEY GO
D CLEAN THE COMMON AREAS IN THAT BUILDING.

A COUNTY OFFICIAL, I MEAN A COUNTY

SOR IS EMPLOYED BY ME.

PLOYED BY THE COUNTY?

EST OF TIME I SUGGEST

ABLE COPY

*Appendix V*

YOU LEAD THE WITNESS. I DON'T THINK THERE WILL BE ANY REAL —

MR. WEBER: ALL RIGHT.

BY MR. WEBER:

Q. AND THE NIGHT CREW HAS CLEANED THE "TEN COMMANDMENTS", THEY HAVE DUSTED IT ON OCCASION?

A. YEARS AGO, YES.

Q. THEY DON'T CLEAN IT NOW?

A. I CHECKED, AND THEY GO IN AND THEY DO THE FLOORS. NOW, THEY ARE ASSIGNED TO THAT AREA, BUT THEY DO THE FLOORS IN THAT [23] AREA. NOW, IF IT GETS CLEANED, THEN THEY WOULD CLEAN IT.

Q. AND YOU HAVE SEEN THE "TEN COMMANDMENTS"; IS THAT CORRECT?

A. PARDON?

Q. YOU HAVE SEEN THE "TEN COMMANDMENTS" RECENTLY?

A. YES; I HAVE.

Q. AND IS IT CLEAN?

A. AS CLEAN AS THE WALL IS.

*Appendix V*

Q. OKAY. AND THERE'S ALSO A DAYTIME PERSON; IS THAT CORRECT?

A. THERE IS A DAYTIME PERSON NOT ASSIGNED TO THAT AREA, THOUGH.

Q. THE DAYTIME PERSON IS A MAID?

A. RIGHT.

Q. AND SHE HAS CLEANED THE "TEN COMMANDMENTS"?

A. WHEN SHE WAS ASSIGNED TO THAT AREA, SHE PROBABLY DID. I CAN'T SAY "YES" OR "NO". YEARS AGO SHE WAS ASSIGNED TO THAT AREA.

Q. I BELIEVE YOU TESTIFIED BEFORE, DID YOU NOT, AT A DEPOSITION? YOU REMEMBER I ASKED YOU QUESTIONS AT A DEPOSITION?

A. RIGHT. OH, YES.

Q. AND YOU TESTIFIED AT THAT TIME, DIDN'T YOU, THAT THE DAYTIME MAID, NETTIE BARNES, TO YOUR KNOWLEDGE, CLEANED THE "TEN COMMANDMENTS"?

A. I SAID TO MY KNOWLEDGE THAT, KNOWING THE PEOPLE, KNOWING THE PERSONALITIES OF THE PEOPLE, NETTIE BARNES AND ED DUNN, [24] THAT, IF IT GOT CLEANED, THAT PROBABLY NETTIE WENT OUT THERE AND CLEANED IT, ALTHOUGH IT WAS NOT ASSIGNED TO HER AREA.

*Appendix V*

Q. NOW, THE AREA WHERE THE "TEN COMMANDMENTS" IS LOCATED IS A BIG — WAS A BIG SMOKING AREA, WASN'T IT?

A. YES.

Q. WHEN IT WAS ALLOWED?

A. YES.

Q. AND THERE WAS NICOTINE BUILD-UP ON THE WALLS; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. AND ISN'T IT TRUE THAT THEY HAD TO TAKE DOWN THE "TEN COMMANDMENTS" AT ONE POINT BECAUSE OF THE NICOTINE BUILD-UP ON IT?

A. I INSTRUCTED THE — THERE, AGAIN, I INSTRUCTED THE SUPERVISOR WITH INMATES TO CLEAN THE WALLS IN THAT AREA, AND IT'S MY UNDERSTANDING THAT THEY TOOK THAT DOWN, CLEANED THE WALL, AND PUT IT BACK UP.

Q. OKAY. NOW I'M GOING TO SHOW YOU WHAT HAS BEEN MARKED PLAINTIFFS' EXHIBIT NUMBER 1. DO YOU RECOGNIZE THIS SCENE?

A. YES; I DO.

Q. IS THAT PHOTOGRAPH A FAIR AND ACCURATE DEPICTION OF THE SCENE?

A. RIGHT.

Q. AND WHAT IS THAT PLAQUE THAT YOU SEE ON THE RIGHT SIDE?

A. THE "TEN COMMANDMENTS".

* * *

[26] THE COURT: ANY OBJECTION?

MR. GENTRY: NO OBJECTION.

THE COURT: IT IS ADMITTED.

BY MR. WEBER:

Q. MR. COX, DO YOU RECOGNIZE THIS?

A. YES; I DO.

Q. IS THAT A FAIR AND ACCURATE DEPICTION OF THE SCENE THAT YOU HAVE SEEN?

A. RIGHT.

Q. AND WHAT IS THIS?

A. THIS, AGAIN, IT'S THE PLAQUE OF THE "TEN COMMANDMENTS".

MR. WEBER: YOUR HONOR, WE WOULD ASK THAT PLAINTIFFS' EXHIBIT NUMBER 2 BE ADMITTED INTO

*Appendix V*

EVIDENCE.

MR. GENTRY: WE WOULD LIKE TO SEE IT.

MR. WEBER: I'M SORRY. IT'S JUST A BLOW-UP.

MR. GENTRY: WE HAVE NO OBJECTION.

THE COURT: ALL RIGHT, IT IS ADMITTED.

BY MR. WEBER:

Q. NOW, I WANT TO JUST REAL BRIEFLY RETURN TO THE DAYTIME PERSON. NOW, WOULD SHE LIKE CLEAN THE WINDOW LEDGES, AROUND THE WINDOWS?

A. ARE WE TALKING NOW OR IN THE PAST, AND WHAT AREA ARE WE TALKING ABOUT?

Q. IS THERE A DAYTIME PERSON THAT IS RESPONSIBLE FOR THAT AREA?

[27] A. THERE'S A DAYTIME — NO, THERE IS NOT.

Q. THERE'S NO DAYTIME PERSON? JUST THE NIGHT CREW NOW?

A. JUST THE NIGHT CREW.

Q. WHEN THERE WAS A DAYTIME PERSON, DID THEY CLEAN THE PICTURES, LIKE THE PICTURES OF JUDGES, I'M ASSUMING THERE ARE PICTURES OF THE JUDGES THERE, OR ANY PLAQUES AT ALL?

*Appendix V*

A. THEY PROBABLY DUSTED THE AREA.

Q. NOW, YOU TESTIFIED PREVIOUSLY THAT THERE'S A BENCH RIGHT IN FRONT OF THE "TEN COMMANDMENTS"?

A. RIGHT.

Q. ARE THERE ANY OTHER BENCHES THAT YOU ARE AWARE OF?

A. THERE ARE SOME CHAIRS —

Q. ARE THERE ANY OTHER BENCHES?

A. NOT THAT I'M AWARE — NOT MADE OUT OF MARBLE. THERE MAY BE SOME OTHER BENCHES IN THE COURTHOUSE. I'M NOT SURE.

Q. AND THIS "TEN COMMANDMENTS" IS KIND OF OFFSET?

A. RIGHT.

MR. WEBER: THANK YOU. I HAVE NO FURTHER QUESTIONS.

MR. GENTRY: JUDGE, I PROBABLY NEED TO ASK THE COURT MAY WE DO OUR DIRECT NOW?

THE COURT: YOU CAN CROSS.

MR. GENTRY: IT WILL BE OUR DIRECT, BUT IT WILL

*Appendix V*

BE CROSS TOO, BUT I WANTED TO BE SURE WE CAN GO AHEAD AND GO FORWARD WITH IT.

THE COURT: YES, SIR.

[28] CROSS EXAMINATION

BY MR. GENTRY:

Q. MR. COX, CLEANING IN THIS AREA CONSISTS NOW OF WHAT YOU HAVE TOLD THE COURT HERE, A SUPERVISOR WITH INMATES. ARE THOSE INMATES PAID ANYTHING BY THE COUNTY?

A. NO, SIR; THEY ARE NOT PAID.

Q. ALL RIGHT, SIR.

DO YOU KNOW WHETHER OR NOT THIS PLAQUE IN AND OF ITSELF IS CLEANED REGULARLY?

A. IT IS NOT CLEANED ON A REGULAR BASIS.

Q. THE ONLY TIME THAT YOU HAVE ANY KNOWLEDGE OF IT BEING CLEANED IS WHEN THAT WALL WAS CLEANED AND IT WAS TAKEN DOWN?

A. RIGHT.

Q. DO YOU —

A. WE CLEAN EVERYTHING ON THE WALLS WHEN WE CLEAN THE WALLS, WHICH IS ONE TIME SINCE I HAVE

BEEN THERE IN SIX YEARS.

Q. SIX YEARS. YOU KNOW THAT—

A. THAT WAS BECAUSE OF THE NICOTINE.

Q. YES, SIR. I UNDERSTAND.

DO YOU KNOW FOR A FACT WHETHER OR NOT THAT THAT DOCUMENT WAS CLEANED THEN OR IF IT WAS JUST TAKEN DOWN AND PUT BACK UP?

A. I DON'T KNOW FOR SURE WHETHER IT WAS CLEANED OR NOT. I ASSUME IT WAS, BUT I DON'T KNOW.

Q. AND AT THE TIME THIS ACTIVITY TOOK PLACE WAS THIS DONE BY [29] THE INMATES?

A. RIGHT.

Q. NO FUNDS WERE EXPENDED AT THAT TIME?

A. RIGHT.

Q. YOU NEVER DIRECTED ANYONE TO CLEAN THAT DOCUMENT OR THE FRAME AND ABOUT, HAVE YOU?

A. NO; I HAVEN'T.

Q. TO YOUR KNOWLEDGE, DO YOU KNOW OF ANY FUNDS OR MONIES THAT HAVE BEEN SPECIFICALLY ALLOCATED FOR THE UPKEEP OF THAT DOCUMENT?

A. NONE.

MR. GENTRY: THANK YOU, SIR.

REDIRECT EXAMINATION

BY MR. WEBER:

Q. MR. COX, JUST A COUPLE OF QUESTIONS. HAVE PEOPLE NORMALLY — PEOPLE THAT WORK IN THE COURTHOUSE NORMALLY CLEAN THINGS WHEN THEY GET DIRTY, RIGHT? I MEAN, I WOULD HOPE THAT'S WHAT THEY DO.

A. I WOULD HOPE SO ALSO.

Q. AND THERE HAVEN'T BEEN ANY SPECIAL EXCLUSIONS MADE FOR THIS "TEN COMMANDMENTS" DISPLAY, HAVE THERE?

A. NONE.

Q. SO IT IS CLEANED WHEN IT GETS DIRTY JUST LIKE EVERYTHING ELSE, OR, AT LEAST, THAT'S WHAT YOU HOPE?

A. THAT'S RIGHT.

[30] Q. NOW, THE INMATES ARE COUNTY INMATES, TO YOUR KNOWLEDGE, RIGHT?

A. RIGHT.

*Appendix V*

Q. AND THEY ARE HOUSED BY THE COUNTY?

A. RIGHT.

Q. COUNTY FUNDS?

A. RIGHT.

Q. THEY ARE FED BY THE COUNTY?

A. I DON'T KNOW FOR SURE, BUT I'M ASSUMING THAT ALL OF THOSE THINGS ARE RIGHT. I'M NOT THE AUTHORITY ON THAT.

Q. AND THE INMATE SUPERVISOR, LIKE YOURSELF, IS PAID BY THE COUNTY?

A. RIGHT.

MR. WEBER: NO FURTHER QUESTIONS.

THE COURT: YOU MAY STEP DOWN. YOU MAY BE EXCUSED. THANK YOU.

(WITNESS EXCUSED FROM THE STAND)

THE COURT: CALL YOUR NEXT WITNESS, PLEASE.

MR. COHEN: YOUR HONOR, WE CALL MACK HENDERSON.

THE CLERK: MACK HENDERSON, PLEASE REPORT TO JUDGE SHOOB'S COURTROOM. MR. HENDERSON,

*Appendix V*

WOULD YOU PLEASE COME FORWARD?

THE WITNESS: YES, MA'AM.

THE CLERK: DO YOU WANT TO BE SWORN?

THE WITNESS: PLEASE.

* * *

[36] THAT.

MR. COHEN: OKAY.

BY MR. COHEN:

Q. WITH REGARD TO THE PANEL'S DISPLAY, IN YOUR OPINION AS THE CHIEF EXECUTIVE OFFICER OF COBB COUNTY IS IT DISPLAYED FOR A RELIGIOUS PURPOSE?

A. NO, SIR; IT'S NOT DISPLAYED FOR A RELIGIOUS PURPOSE.

Q. AND IS IT YOUR OPINION, AS THE CHIEF EXECUTIVE OFFICER OF COBB COUNTY, THAT THE COUNTY DOES NOT ENDORSE RELIGION?

A. ALL OF OUR RECORDS ARE FREE OF RACE, CREED, OR RELIGION, AND WE ARE AN EQUAL OPPORTUNITY EMPLOYER AS WELL AS AFFIRMATIVE ACTION, SIR.

Q. I AM GOING TO HAND YOU WHAT HAS BEEN MARKED AS EXHIBIT 3, AND I'M GOING TO ASK THAT YOU TELL

*Appendix V*

ME WHAT IT IS. JUST READ THIS.

THE COURT: MR. COHEN, WHAT DIFFERENCE WOULD IT MAKE AS TO THE MOTIVES OF THE COBB COUNTY COMMISSION OR ANY OTHER AUTHORITY FOR HANGING THE "TEN COMMANDMENTS"? THE QUESTION AND THE ISSUE IS WHETHER THIS IS A RELIGIOUS DOCUMENT AND WHETHER IT FALLS UNDER THE LEMON VERSUS KURTZMAN TEST AND WHETHER IT SHOULD BE PERMITTED TO BE HUNG OR NOT HUNG. WHAT THEY DECIDE WOULDN'T HAVE ANY EFFECT ON THE DECISION OF THIS COURT. THEY COULD DECIDE IT WAS A RELIGIOUS DOCUMENT OR IT WAS NOT A RELIGIOUS DOCUMENT, AND IT WOULD HAVE ABSOLUTELY NO EFFECT ON THE DECISION OF THIS COURT.

* * *

[57] MEMBERS OF THE BAR ARE WILLING TO STEP FORWARD AND VOLUNTEER THEIR TIME IN AN ACTION LIKE THIS, BUT I BELIEVE THAT THE CONSTITUTION WILL BE MET BY SPENDING NO MONEY IN SUPPORT OF THIS.

THE COURT: ARE YOU HANDLING THIS ON A PRO BONO BASIS?

MR. GENTRY: WE ARE STAFF ATTORNEYS, YOUR HONOR. THAT IS OUR POSITION IN THE MATTER. WE ARE NOT PAID FOR THIS SPECIFIC CASE. WE ARE PAID ON A SALARY BASIS. I MEAN, HE WAS COMING AT US THAT WE WERE SPENDING SPECIAL MONIES TO DEFEND THIS.

PREVIOUSLY, THE COUNTY, UNTIL DECEMBER OF THIS PAST YEAR, THE COUNTY HAD OUTSIDE COUNSEL THEY PAID AT SOME $85.00 AN HOUR FOR WORK. WE ARE ON THE COUNTY PAYROLL.

THE COURT: I WOULD CERTAINLY THINK THE COUNTY WOULD BE ENTITLED TO PAY ITS LAWYERS TO DEFEND THE COUNTY IN ANY TYPE OF SUIT. THERE HASN'T BEEN ANY JUDICIAL DETERMINATION. IT WOULD BE A RATHER ABSURD SITUATION WHERE THE COUNTY WOULD BE COMPELLED TO OBTAIN PRO BONO REPRESENTATION UNTIL THERE IS A LEGAL DETERMINATION.

MR. GENTRY: CERTAINLY, YOUR HONOR.

MR. WEBER: I WOULD STATE FOR THE RECORD WE ARE ALSO DOING IT ON A PRO BONO BASIS.

BY MR. WEBER:

Q. ARE YOUR OBJECTIONS BOTH TO THE "TEN COMMANDMENTS" AND TO THE JESUS QUOTE?

* * *

[64] MY HEAD. I LOOKED TO A POLITICAL SOLUTION FOR THE COMMISSIONERS TO SHUFFLE THIS HOT POTATO AWAY. I CHOSE NOT TO ADDRESS DIRECTLY THE ISSUES AT TRIAL HERE WITH THEM, BECAUSE IT WAS CLEAR THEY FELT COMPELLED BY THEIR CONSTITUENCY TO DEFEND IT. I WAS SIMPLY POINTING OUT TO THEM THAT, IF THEY CHOSE TO DEFEND IT, THEY HAD TO DO IT WITH SOMETHING OTHER THAN PUBLIC FUNDS.

*Appendix V*

Q. BUT I REFER YOU TO PARAGRAPH 3, AND YOU SAY: "UNDER THE CONSTITUTION OF GEORGIA WE CANNOT SPEND PUBLIC FUNDS TO DEFEND THIS ACTION."

A. YES, SIR. I BELIEVE THAT TO BE A CORRECT STATEMENT OF THE LAW, AND THAT'S WHAT THE PURPOSE OF THE ATTACHMENT IS DESIGNED TO SUPPORT.

Q. WOULD YOU HAVE THE COMMISSION NOT SPEND PUBLIC FUNDS ON OTHER CONSTITUTIONALLY QUESTIONED ACTIONS?

A. SIR, AS A CITIZEN, I GUESS I HAVE A VOTE, BUT I DON'T THINK IT'S AS STRONG AS YOU WOULD IMPLY. I WOULD HAVE THE COMMISSION ABIDE BY SECTION 7 OF ARTICLE I OF THE BILL OF RIGHTS TO THE CONSTITUTION OF THE STATE OF GEORGIA, WHICH SAYS: "NO MONEY SHALL EVER BE TAKEN FROM THE PUBLIC TREASURY, DIRECTLY OR INDIRECTLY, IN AID OF ANY CHURCH, SECT, CULT, OR RELIGIOUS DENOMINATION, OR OF ANY SECTARIAN INSTITUTION."

Q. WELL, DO YOU RECOGNIZE THIS, THAT THIS CASE INVOLVES THE QUESTION OF THE CONSTITUTIONALITY OF THIS DOCUMENT AND WHERE IT IS LOCATED?

* * *

[92] THE WITNESS: YES; I AFFIRM.

THE CLERK: DO YOU SOLEMNLY AFFIRM THAT THE EVIDENCE YOU SHALL GIVE IN THE CAUSE NOW

*Appendix V*

PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, THIS YOU DO UNDER THE PAINS AND PENALTIES OF PERJURY?

THE WITNESS: I DO.

THE CLERK: HAVE A SEAT IN THE WITNESS STAND AND STATE YOUR FULL NAME, PLEASE.

THE WITNESS: BRUCE STEPHEN HARVEY.

— — —

BRUCE STEPHEN HARVEY

A PLAINTIFF, CALLED AS A WITNESS, AFTER HAVING FIRST BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. COHEN:

Q. MR. HARVEY, YOU TESTIFIED AT THE TEMPORARY RESTRAINING ORDER HEARING THAT A LARGE PORTION OF YOUR PRACTICE CONSISTS OF CLIENTS REPRESENTED IN COBB COUNTY; IS THAT RIGHT?

A. SOME PORTION OF MY PRACTICE DOES, YES. I THINK I TESTIFIED IT WAS SOMEWHERE BETWEEN 15 AND 20 PERCENT.

Q. AND DO YOU HAVE OCCASION TO ENTER THE COBB COUNTY STATE COURTHOUSE?

A. YES; I DO.

Q. ON THE FIRST FLOOR, THE TRAFFIC COURT ROOMS?

A. YES.

[93] Q. IN THE COURSE OF REPRESENTING CLIENTS IN COBB COUNTY HAVE YOU EVER HAD OCCASION TO PURCHASE GOODS IN COBB COUNTY?

A. ON NUMEROUS OCCASIONS.

Q. OKAY, WHAT KINDS OF THINGS HAVE YOU PURCHASED IN COBB COUNTY?

A. ANY NUMBER OF ITEMS: PERSONAL ITEMS, CLOTHES, FURNITURE, LUNCHES, CIGARETTES.

Q. DO YOU PAY FOR PARKING WHEN YOU PRACTICE IN COBB COUNTY?

A. YES, YES; I DO. WELL, IF I PARK IN THE COUNTY PARKING LOT, CHARGE YOU TWO BUCKS.

Q. MR. HARVEY, I'M GOING TO SHOW YOU WHAT IS MARKED AS PLAINTIFFS' EXHIBIT 4.

MR. GENTRY: YOUR HONOR, WE OBJECT TO THIS EXHIBIT. I BELIEVE ON THE DEPOSITION WE OBJECTED.

THE COURT: HE HASN'T TENDERED IT.

MR. GENTRY: I UNDERSTAND.

*Appendix V*

THE COURT: WHEN HE TENDERS IT YOU MAY OBJECT.

BY MR. COHEN:

Q. WOULD YOU PLEASE DESCRIBE THAT PHOTOGRAPH AND WHAT IT DEPICTS?

A. WELL, IT'S A XEROX COPY OF A PHOTOGRAPH WHICH DEPICTS THE "TEN COMMANDMENTS" THAT ARE IDENTIFIED AND THE SAME PLAQUE THAT IS IDENTIFIED IN PLAINTIFFS' EXHIBITS NUMBERS 1 AND 2 AND SHOWS A MALE AND A FEMALE SITTING ON THE BENCH BENEATH THE PLAQUE IDENTIFIED IN PLAINTIFFS' EXHIBITS NUMBERS 1 AND 2.

* * *

[131] THE COURT: I AM SORRY FOR THE DELAY. IS THE PLAINTIFF FINISHED WITH YOUR WITNESSES?

MR. COHEN: YES, YOUR HONOR.

THE COURT: YOU HAVE GOT ONE REBUTTAL WITNESS, AS I UNDERSTAND?

MR. COHEN: POSSIBLY.

THE COURT: ALL RIGHT, THE DEFENDANT MAY PROCEED.

MS. CALLAWAY: WE WOULD LIKE TO CALL MR. HERBERT MCCOLLUM.

*Appendix V*

THE CLERK: MR. MCCOLLUM, WOULD YOU COME FORWARD AND STAND RIGHT HERE? WOULD YOU RAISE YOUR RIGHT HAND AND TAKE THE OATH?

DO YOU SOLEMNLY SWEAR THE TESTIMONY YOU SHALL GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: I DO.

THE CLERK: HAVE A SEAT IN THE WITNESS STAND AND STATE YOUR FULL NAME, PLEASE.

— — —

HERBERT MCCOLLUM

CALLED AS A WITNESS BY THE DEFENDANT, AFTER HAVING FIRST BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. CALLAWAY:

Q. MR. MCCOLLUM, WHAT IS YOUR CURRENT EMPLOYMENT?

[132] A. I'M RETIRED.

Q. AND WERE YOU, EVER AN OFFICIAL WITH COBB COUNTY?

A. YES; I WAS.

Q. AND TELL US ABOUT WHAT POSITION YOU HELD WITH THE COUNTY AND WHEN.

A. I STARTED WORK FOR THE COUNTY IN 1947 AND WORKED AS CLERK TO THE COMMISSIONER UNTIL '57 AND WAS ELECTED TO THE OFFICE AT THAT TIME AND STAYED —

Q. HOW LONG — I'M SORRY.

A. — STAYED IN AS AN ELECTED OFFICIAL FOR EIGHT YEARS, THROUGH '64.

Q. AND AT THAT TIME WERE YOU A SOLE COMMISSIONER, OR WAS THERE A BOARD OF COMMISSIONERS?

A. I WAS THE SOLE COMMISSIONER.

Q. AND FOLLOWING YOUR TENURE AS COMMISSIONER WHO BECAME COMMISSIONER?

A. WELL, HAD A BOARD OF COMMISSIONERS AFTER ME, I WAS THE LAST ONE-MAN COMMISSIONER OF THE COUNTY, AND ERNEST BARRETT WAS THE CHAIRMAN OF THE COMMISSION.

Q. AND WERE YOU IN OFFICE AT THE TIME THAT THE PLAQUE WAS ACTUALLY MOVED FROM THE OLD COURTHOUSE TO THE NEW COURTHOUSE?

A. NO.

*Appendix V*

Q. WHO WAS THE COMMISSIONER IN 1947 WHEN YOU WENT TO WORK FOR THE COUNTY?

A. GEORGE MCMILLAN.

[133] Q. AND WHAT — HOW LONG HAD HE BEEN IN OFFICE, MR. MCCOLLUM?

A. I GUESS HE WAS ON HIS SECOND TERM WHEN I WENT IN.

Q. AND DO YOU RECALL WHO IN THE LATE 1930'S WAS THE COMMISSIONER AT THAT TIME?

A. CHARLIE HEAD WAS BEFORE GEORGE MCMILLAN.

Q. NOW, IS MR. HEAD STILL LIVING?

A. NO.

Q. IS MR. MCMILLAN STILL IN LIFE?

A. NO.

Q. IS MR. BARETT STILL IN LIFE?

A. NO.

Q. OR MR. HEAD?

A. NO.

Q. ARE YOU THE ONLY SURVIVING SOLE

COMMISSIONER AT THIS POINT?

A. I AM.

Q. NOW, WHEN DID YOU FIRST SEE THE "TEN COMMANDMENTS" HANGING IN THE COURTHOUSE?

A. IT WAS EITHER '39, 1939, OR 1940.

Q. AND DO YOU RECALL THAT SPECIFICALLY, SEEING THEM FOR THE FIRST TIME?

A. YES. AT THAT TIME I WAS DATING MY WIFE, AND SHE WAS FROM DAHLONEGA AND HAD COME DOWN TO MARIETTA TO SEE THE LIGHTS AND VISIT HER RELATIVES THERE, AND WE HAD A DATE, AND I TOOK HER TO THE COURTHOUSE AND SHOWED HER THAT PLAQUE. THAT WAS BEFORE I [134] ENTERED THE SERVICE, BEFORE WE WERE MARRIED.

Q. AND DID YOU — WERE YOU IN THE SERVICE DURING THE FORTIES?

A. YES.

Q. FOR HOW MANY YEARS?

A. FIVE YEARS.

Q. I AM GOING TO SHOW YOU, MR. MCCOLLUM, WHAT HAS BEEN MARKED DEFENDANT'S EXHIBIT NUMBER 2 AND ASK IF YOU CAN IDENTIFY THIS DOCUMENT?

A. YES. THAT'S THE OLD COURTHOUSE THAT'S NOW DESTROYED.

Q. WOULD THAT BE A TRUE AND ACCURATE REPRESENTATION OF THE COURTHOUSE AS YOU RECALL IT?

A. YES; IT SURE IS.

Q. WOULD YOU POINT TO THE PLACE IN THE COURTHOUSE FOR THE COURT AND SHOW HIM WHERE THE "TEN COMMANDMENTS" WAS HUNG?

A. IT WAS HUNG BEHIND THIS ARCH RIGHT HERE ON THIS SIDE. THE HALL WENT DOWN THROUGH THERE, AND THE "TEN COMMANDMENTS" WAS ON THE LEFT OF THE HALL HANGING RIGHT BEHING THIS ARCH HERE.

Q. THANK YOU.

MS. CALLAWAY: WE WOULD LIKE TO TENDER DEFENDANT'S EXHIBIT 2.

THE COURT: ANY OBJECTION?

MR. COHEN: NO OBJECTION.

THE COURT: ALL RIGHT, IT IS ADMITTED.

BY MS. CALLAWAY:

Q. DO YOU HAVE ANY KNOWLEDGE OF THE REASON AND THE PURPOSE [135] THAT THE "TEN

COMMANDMENTS" PLAQUE WAS DONATED TO THE COUNTY?

A. THE ONLY — THE ONLY THING I COULD SAY ABOUT IT WAS THE COMMON KNOWLEDGE WAS THE GARDNER FAMILY PUT IT THERE. THAT'S ALL I KNOW.

Q. AND INSOFAR AS THE REASON BEHIND THEM PUTTING IT THERE, DO YOU HAVE ANY KNOWLEDGE OF THAT?

A. NO, EXCEPT WHAT I — THE COMMON KNOWLEDGE THAT WENT AROUND, IT WAS PRESENTED BY THE GARDNER FAMILY.

MR. WEBER: WE OBJECT TO ANY TESTIMONY AS TO COMMON KNOWLEDGE. IF THE WITNESS HAS PERSONAL KOWLEDGE OF WHY THE PLAQUE WAS PUT UP, HE CAN TESTIFY TO THAT, BUT, IF HE DOESN'T HAVE KNOWLEDGE, IF HE'S JUST SPECULATING, AND WE WOULD OBJECT.

THE COURT: WHAT DO YOU SAY ABOUT THAT?

MS. CALLAWAY: WELL, YOUR HONOR, MR. MCCOLLUM WAS IN OFFICE AND PERHAPS HAD FROM TIME TO TIME QUESTIONS ABOUT HOW THE PLAQUE GOT THERE. HE'S JUST PRESENTING WHAT HE KNOWS ABOUT IT.

THE COURT: I WILL PERMIT IT. GO AHEAD.

BY MS. CALLAWAY:

*Appendix V*

Q. WHILE YOU WERE IN OFFICE, MR. MCCOLLUM, WAS ANY COUNTY MONEY EXPENDED ON THE PLAQUE?

A. NO.

Q. DO YOU KNOW WHO CLEANED THE PLAQUE OR MAINTAINED THE PLAQUE DURING THAT PERIOD OF TIME?

A. I BELIEVE THEY WERE THE DAUGHTERS OF THE REVOLUTION OR [136] SOME ORGANIZATION OF LADIES THAT ALWAYS COME BY ONCE A MONTH OR SO AND CLEANED THAT.

Q. OKAY. AND DURING YOUR TENURE AS THE COUNTY COMMISSIONER, WAS IT YOUR CONCLUSION THAT THIS DOCUMENT THAT HUNG IN THE COURTHOUSE OUT BESIDE YOUR OFFICE WAS HUNG THERE FOR ANY RELIGIOUS PURPOSE?

A. NO.

MR. WEBER: YOUR HONOR, THAT'S A LEADING QUESTION.

THE COURT: I WILL PERMIT IT IN THE INTEREST OF TIME.

BY MS. CALLAWAY:

Q. WAS IT HANGING THERE IN ANY WAY TO ADVANCE ANY RELIGION?

A. NO.

Q. DID THE COUNTY ENDORSE IT AS A RELIGIOUS —

A. NO.

Q. — ENDORSEMENT OF A RELIGION?

A. NO.

THE COURT: ANY QUESTIONS?

CROSS EXAMINATION

BY MR. WEBER:

Q. HELLO, MR. MCCOLLUM. NAME IS JERRY WEBER. I HAVE JUST A FEW QUESTIONS FOR YOU.

NOW, YOU WERE A — WITH COBB COUNTY COMMISSION FROM 1947 TO 1955 AS A COMMISSIONER; IS THAT CORRECT?

A. NO, NO. I WAS CLERK TO THE COMMISSIONER.

Q. OKAY. SO YOU WEREN'T AROUND IN 1937 WHEN THIS PANEL WAS [137] PLACED; IS THAT CORRECT?

A. NO; I WASN'T, THERE AT THAT TIME; NO.

Q. YOU WEREN'T A COUNTY OFFICIAL IN 1937?

A. NO, NO.

*Appendix V*

Q. YOU WEREN'T INVOLVED IN THE DECISION TO PUT UP THE PLAQUE?

A. NO.

Q. NOW, YOU SAID THAT YOU SAW, YOU VIEWED THE "TEN COMMANDMENTS" IN ITS ORIGINAL PLACEMENT; IS THAT CORRECT? IN THE OLD COURTHOUSE, YOU SAW IT IN THE OLD COURTHOUSE?

A. YES, YES; I DID.

Q. WAS IT BY ITSELF? WERE THERE OTHER CODES? WAS THE CODE OF HAMMURABI UP THERE?

DO YOU KNOW WHAT THE CODE OF HAMMURABI IS?

A. NO.

Q. WERE THERE ANY OTHER PLAQUES AROUND THE "TEN COMMANDMENTS"?

A. NO. IT WAS JUST ONE BIG —

Q. BY ITSELF?

A. BY ITSELF.

Q. NOW, I WAS A LITTLE CONFUSED AS TO YOUR TESTIMONY AS TO WHETHER COUNTY FUNDS WERE EXPENDED. THE PLAQUE WAS CLEANED, RIGHT? I MEAN, IT WAS CLEANED BY MAINTENANCE PEOPLE; IS THAT CORRECT?

Supreme Court, U.S.
FILED
MAY 9 1994
OFFICE OF THE CLERK

No. 93-1721

In The

# Supreme Court of the United States

October Term, 1993

COBB COUNTY, GEORGIA,

*Petitioner*

v.

BRUCE S. HARVEY and JAMES D. CUNNINGHAM

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF FOR RESPONDENTS IN OPPOSITION

DAVID J. BEDERMAN
*Counsel of Record*
Gambrell Hall
Atlanta, Georgia 30322-2770
Phone (404) 727-6822

MARSHALL L. COHEN
55 Marietta Street
Suite 1830
Atlanta, Georgia 30303

GERALD R. WEBER
ACLU of Georgia, Inc.
142 Mitchell Street
Suite 301
Atlanta, Georgia 30303

MICHAEL R. HAUPTMAN
34 Peachtree Street, NW
Suite 2200
Atlanta, Georgia 30303

*Attorneys for Respondents*

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

Did the lower courts err in their fact-based determination that the prominent placement of the Ten Commandments in a courthouse, accompanied by a quote from Jesus to "Love the Lord," but unaccompanied by any secular messages, violates the Establishment Clause?

II

Did the lower courts correctly hold that respondents had standing to challenge the constitutionality of a religious display that was maintained with county funds and with which they had frequent and unwelcome contact?

No. 93-1721

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

---

COBB COUNTY, GEORGIA, *Petitioner*

v.

BRUCE S. HARVEY and JAMES D. CUNNINGHAM

---

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

# BRIEF FOR RESPONDENTS IN OPPOSITION

---

Respondents, Bruce S. Harvey and James D. Cunningham, respectfully submit this Brief in Opposition to the Petition for Certiorari filed in the above-captioned case.

## STATEMENT

The religious display declared unconstitutional in this case is a three-by-five foot panel of a peculiarly Christian version of the Ten Commandments, combined with selected teachings of Jesus Christ commanding love of God and neighbor. *See* District Court Judgment, Pet. App. 5a-8a. The panel stands alone in the Cobb County State Courthouse in a recessed shrine-like marble alcove above the only bench on the first floor. *See* id. at 5a. The vicinity of the panel is frequented by litigants, jurors, attorneys, and courthouse staff. The panel hangs next to the Clerk's office and across the hall from the Traffic Court courtrooms. *See* id. The County does not post any explanation of the origin or purpose of the display, nor is the display part of any larger exhibit.

The County's own witnesses at trial admitted that the County in 1967 moved the panel from its former location outside the old courthouse to its present location. The County's witnesses testified that a cleaning crew consisting of County employees and inmates (housed, fed, transported, and supervised at County expense), have cleaned the panel on several occasions, including one instance when the panel was removed and replaced in order to clean the heavy build-up of nicotine. *See* id. at 8a-9a.

Respondent Bruce Harvey is a criminal defense attorney who practices in the Cobb County State Court and Traffic Court. The trial court found that he had come into direct and unwelcome contact with the display each time he was in the building. *See* id. at 9a-10a. The district court concluded that Harvey had citizen standing. *See* id. at 12a-15a. Respondent James Cunningham is a Cobb County

resident, property owner, and taxpayer. The trial court found that Cobb County had used public money in the maintenance and upkeep of the display. *See* id. at 16a. The district court ruled that Cunningham had taxpayer standing. *See* id. at 15a-16a.

On the merits, the district court held that the religious display was unconstitutional. However, the district court stayed its order for four months to allow the County, "in consultation with plaintiffs, an opportunity to develop an educational display including the Ten Commandments panel." *See* id. at 22a. Rather than pursue this option, the County appealed to the Eleventh Circuit which upheld the district court in all respects.

---

## ARGUMENT

1. Despite Petitioner's attempt to liberate this case from its facts, the issue presented here is purely contextual: whether the district court erred in applying the second prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in determining the constitutionality of a tablet depicting a Christian version of the Ten Commandments and quotations from Jesus Christ, standing alone and prominently placed in a state court building. The district court, as affirmed by the Court of Appeals, undertook a sensitive analysis of *Lemon*'s second prong, as refined in such cases as *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Allegheny v. ACLU of Pittsburgh*, 492 U.S. 573 (1989). The district court judgment, reprinted at Pet. App. 5a-9a, 19a-21a, carefully considered both the religious content of the tablet and the conditions of its display on government property.

No more could be asked of a court in applying the second prong of *Lemon*. And, despite Petitioner's entreaties, Pet. 18-25, this case is wholly unsuitable as a vehicle to overrule *Lemon* and its progeny. Even if this Court were so disposed to totally recast its Establishment Clause analysis, the very narrow focus of this case would require this Court, in any event, to adopt precisely the same content/context inquiry as used by the district court.

In addition to its argument for jettisoning *Lemon*, Petitioner also requests that this Court overrule *Stone v. Graham*, 449 U.S. 39 (1980), which spoke specifically to public displays of the Ten Commandments. *Stone* settled the matter raised in this case, and Respondents are unaware of any other litigation which seeks to question whether public display of the Commandments, in a courthouse setting, violates the Establishment Clause. Petitioner attempts to create a conflict by citing *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973), but *Anderson* was decided seven years before this Court's ruling in *Stone*, and on facts which suggested that the display of the Ten Commandments was accompanied by historic symbols and imagery. *See* 475 F.2d at 30.

2. Likewise, plenary review of the standing issues raised by Respondent would be pointless. The district court held, and the Court of Appeals affirmed, that *both* Respondents had standing: Harvey as a citizen, Cunningham as a taxpayer. This Court would have to reverse as to both individuals in order to effect a reversal.

More importantly, the district court's analysis of the standing issues is completely consistent with this Court's decisions in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), and *Abington School District v. Schempp*, 373

U.S. 203 (1963). The district court made factual findings that Harvey had come into repeated, direct and unwelcome contact with the religious display. Pet. App. 14a. Likewise, the trial court found that Cobb County had expended public funds for the maintenance of the display, thus triggering Cunningham's taxpayer standing. Pet. App. 16a. Petitioner has nowhere indicated how these factual findings conflict with this Court's standing jurisprudence under the Establishment Clause. Cobb County is simply seeking Supreme Court review on standing issues properly disposed of by specific factual findings at trial.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

DAVID J. BEDERMAN
*Counsel of Record*
Gambrell Hall
Atlanta, Georgia 30322-2770
Phone (404) 727-6822

MARSHALL L. COHEN
55 Marietta Street
Suite 1830
Atlanta, Georgia 30303

GERALD R. WEBER
ACLU of Georgia, Inc.
142 Mitchell Street
Suite 301
Atlanta, Georgia 30303

MICHAEL R. HAUPTMAN
34 Peachtree Street, NW
Suite 2200
Atlanta, Georgia 30303

*Attorneys for Respondents*

May 5, 1994

(3)

Supreme Court, U.S.
FILED
MAY 24 1994
OFFICE OF THE CLERK

No. 93-1721

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

COBB COUNTY, GEORGIA

*Petitioner,*

v.

BRUCE S. HARVEY and JAMES D. CUNNINGHAM,

*Respondents.*

**On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF THE RUTHERFORD INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Alexis I. Crow
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888

Of Counsel

Gregory D. Smith
*(Counsel of Record)*
TN BPR# 013420
THE RUTHERFORD INSTITUTE
One Public Square
Suite 321
Clarksville, TN 37040
(615) 647-1299

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

19 pp

## QUESTION PRESENTED

Does the First Amendment of the U.S. Constitution mandate the complete elimination of religious related free speech by individuals in a public building or forum unless said speech is specifically approved by all non-religious individuals or organizations? Another way of stating this question is whether or not the A.C.L.U., by and through Respondents, should have an absolute veto power of Cobb County, Georgia's right to display the Ten Commandments in the Cobb County Courthouse pursuant to the gift of an individual.

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | iii |
| INTEREST OF AMICUS CURIAE | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 3 |
| ISSUE: Does the First Amendment of the U.S. Constitution mandate the complete elimination of religious related free speech by individuals in a public building or forum unless said speech is specifically approved by all non-religious individuals or organizations? Another way of stating this question is whether or not the A.C.L.U., by and through Respondents, should have an absolute veto power of Cobb County, Georgia's right to display the Ten Commandments in the Cobb County Courthouse pursuant to the gift of an individual. | 3 |
| CONCLUSION | 12 |

## TABLE OF AUTHORITIES


| Cases | Pages |
|---|---|
| *A.C.L.U. v. Rabun County Chamber of Commerce*, 678 F.2d 1379 (11th Cir. 1982) | 10 |
| *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303 (6th Cir. 1990) | 6 |
| *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) | 6 |
| *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160 (7th Cir. 1992) | 10 |
| *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 222 (1990) | 5 |
| *Bowen v. Kendrick*, 487 U.S. 589 (1988) | 10 |
| *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) | 8 |
| *Cohen v. California*, 403 U.S. 15 (1971) | 6, 10 |
| *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) | 5 |
| *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989) | 11 |
| *Gonzales v. North Tip of Lake County, Indiana*, 4 F.3d 1412 (7th Cir. 1993) | 6 |
| *Hague v. C.I.O.*, 307 U.S. 496 (1939) | 5 |
| *Harvey v. Cobb County, GA*, 811 F.Supp. 669 (M.D. Ga. 1993) | *passim* |
| *Kaplan v. Burlington*, 891 F.2d 1024 (2nd Cir. 1989) | 8 |
| *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993) | *passim* |

*Larson v. Valente*, 456 U.S. 228 (1982) . . . . . 9

*Lemon v. Kurtzman*, 403 U.S. 602 (1971) . . . . . 3

*Lynch v. Donnelly*, 465 U.S. 668 (1984) . . . . . 9, 10, 12

*McDaniel v. Paty*, 435 U.S. 618 (1978) . . . . . 8

*Murray v. City of Austin, Texas*, 947 F.2d 147 (5th Cir. 1991) . . . . . 9, 10, 12

*National Socialist Party v. Skokie*, 432 U.S. 43 (1977) . . . . . 4

*Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37 (1983) . . . . . 5

*Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990) . . . . . 8

*Terminiello v. City of Chicago*, 337 U.S. 1 (1949) . . . . . 6

*Texas v. Johnson*, 491 U.S. 397 (1989) . . . . . 4, 6, 10

*Turner v. U.S.*, 396 U.S. 398 (1970) . . . . . 7

*U.S. v. Schwimmer*, 279 U.S. 644 (1928) . . . . . 13

*Walz v. Tax Comm'n*, 397 U.S. 664 (1970) . . . . 12

*Widmar v. Vincent*, 454 U.S. 263 (1981) . . . . . 3, 8, 11

**CONSTITUTIONS**

First Amendment, U.S. Constitution . . . . . *passim*

**STATUTES/RULES**

Sup. Ct. R. 10.1(a) & (c) . . . . . 3, 11

Sup. Ct. R. 37.2 . . . . . 1

Public Law 97-280 (1982) . . . . . 2

F.R.E. 201 . . . . . 7

F.R.E. 202 . . . . . 7

**OTHER**

The Holy Bible, Exodus 20:1-17 . . . . . *passim*

The Holy Bible, John 15:13 . . . . . 7

The Holy Bible, Matthew 22:34-40 . . . . . 4

Bartlett, *Familiar Quotations*, 50th ed., "Lord Acton" 615:15 (Little, Brown & Co. 1982) . . . . . 6

Bartlett, *Familiar Quotations*, 50th ed., "Louis Dembitz Brandeis 678:4 (Little, Brown & Co., 1982) . . . . . 9

L. Caplan, *The Tenth Justice, The Solicitor General and the Rule of Law*, 22 (A.A. Knopf Press, 1987) . . . . . 7

J. Eidsmoe, *Christianity And The Constitution*, 355-378 (Baker Book House, Co., 1987) . . . 8

*Life Magazine*, "Why We Pray", 54 (March, 1994) . . . . . 5

*U.S. News And World Report*, "Spiritual America In God We Trust — Testing Personal Faith In A Cynical Age", 48-51 (April 4, 1994) . . . . . 4, 5

J.W. Whitehead, *The Rights of Religious Persons In Public Education*, 333 (Crossway Books, 1991) . . . . . 2

J.W. Whitehead, *The Second American Revolution*, 93-100 (Crossway Books, 1982) . . . . . 12

No. 93-1721

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

COBB COUNTY, GEORGIA

*Petitioner,*

v.

BRUCE S. HARVEY and JAMES D. CUNNINGHAM,

*Respondents.*

**On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF THE RUTHERFORD INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Rutherford Institute, ("Amicus") respectfully submits this brief as amicus curiae in support of the petition for writ of certiorari filed by the petitioner, Cobb County, Georgia. Pursuant to Sup. Ct. R. 37.2, the parties have consented to the filing of this brief. Amicus has filed the Sup. Ct. R. 37.2 written consent with the Clerk of this Honorable Court.

## INTEREST OF THE AMICUS CURIAE

The Rutherford Institute (hereinafter "Amicus") is a non-profit religious based civil liberties organization that defends the rights of persons of all religious faiths throughout the United States on a *pro bono* basis. Amicus defends school children that wish to pray before school, trains attorneys in First Amendment litigation and educates the general public regarding various

religious legal issues. [J.W. Whitehead, *The Rights of Religious Persons In Public Education*, 333 (Crossway Books, 1991)].

The Rutherford Institute's interest in this case is similiar to that promoted by the U.S. Congress and President Reagan's October 4, 1982 declaration that 1983 is the "Year of the Bible". Their interest (as well as Amicus') is:

> ...Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the Unites States;
>
> ...this Nation now faces great challenges that will test this Nation as it has never been tested before; and
>
> ....renewing our knowledge of and faith in God through Holy Scripture can strengthen us as a nation and a people...

[Public Law 97-280 (1982)]. Protection of religious rights for all Americans in the face of direct attack on those rights is the interest of Amicus.

## SUMMARY OF ARGUMENT

The First Amendment of the United States Constitution does not prohibit the posting of a religious/historical document such as the Ten Commandments in a public forum when said document is designed as a tribute to an individual or family or an act of freedom of expression by an individual. Petitioner does not actively promote the document in question with money or extraordinary maintenance. Respondents have not shown any actual injury or standing to bring this lawsuit. Further, the lower court's decisions granted Respondents a *de facto* veto power over any efforts Petitioner made to retain the Ten Commandments display. This *de facto* veto power strips Petitioner and the individual of the opportunity to express their religious views in a public forum and is far beyond the graying line of Establishment Clause constitutional muster set out in "the

*Lemon* test". [*Lemon v. Kurtzman*, 403 U.S. 602 (1971)]. Freedom of opportunity, be it in thought, speech, action or belief is the backbone of the Bill of Rights. The present decision in this case must be reversed because it undermines Petitioner's freedom of opportunity. Finally, the lower courts never considered this case as a First Amendment Free Speech case instead of an Establishment Clause issue.

Certiorari should be granted pursuant to Sup. Ct. R. 10.1 (a) and (c).

## ARGUMENT

**ISSUE: Does the First Amendment of the U.S. Constitution mandate the complete elimination of religious related free speech by individuals in a public building or forum unless said speech is specifically approved by all non-religious individuals or organizations? Another way of stating this question is whether or not the A.C.L.U., by and through Respondents, should have an absolute veto power of Cobb County, Georgia's right to display the Ten Commandments in the Cobb County Courthouse pursuant to the gift of an individual.**

The Constitution of the United States guarantees freedom *of* religion, *not* freedom *from* religion. [*Widmar v. Vincent*, 454 U.S. 263, 269 (1981)]. Specifically, clause 1 of the First Amendment says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...". The orders of the Eleventh Circuit and the Middle District of Georgia unwittingly dictate freedom from religion because the courts allow Respondents absolute power to set out the requirements, if any, necessary to allow Cobb County's Ten

Commandments to remain on their courthouse wall. [*Harvey v. Cobb County, GA*, 811 F.Supp. 669 (M.D. Ga. 1993), hereinafter, "Harvey"]. Specifically, the District Court opined, "...the Court...give[s] Cobb County, in consultation with plaintiffs [Respondents], an opportunity to develop an education display including the Ten Commandments panel... If Cobb county fails to develop an appropriate display approved by the Court, the panel must be removed." [*Harvey*, 811 F.Supp. at 679]. The District even suggested that Respondents' expert be employed as a consultant for any proposed display. [*Id.*]. All that Respondents had to do to assure that Petitioner's display be removed was choose not to negotiate. The lower court orders granted Respondents an absolute veto power over Petitioner's Ten Commandments display[1] from Exodus 20:1-17.

Amicus acknowledges that the U.S. Constitution is designed to be anti-majoritarian and protect the dissenting minority views from the views of the majority of America. [*See e.g.*, *National Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) and *Texas v. Johnson*, 491 U.S. 397, 404 (1989)]. Amicus respectfully asserts that the same Constitution protects the majority from the minority too. It does not take a master researcher to learn that Petitioner's view in the present case is the majority view. The cover of the April 4, 1994 *U.S. News and World Report* declares, "Spiritual America In God We Trust — Testing Personal Faith In A Cynical Age". Inside this magazine, a national opinion poll indicates that 93% of Americans believe in God. [*Id.* at 48]. This same poll shows that 55% of those surveyed believe that "God is the moral guiding force of American democracy". [*Id.* at 51]. Nearly half of those surveyed also believe that President Jefferson's "wall of separation" should not be absolute. [*Id.*]. Unfortunately, the influence of religion is on the decline in America. [*Id.* at 50]. Decisions such as the

---

[1] The display in question also includes "the Great Commandment" from Matthew 22:34-40. For convenience, Amicus will collectively refer to both as "the panel" or "the Ten Commandments".

one in this case are a primary reason that religion is being strangled. Courts confuse the fact that "separation of church and state" simply means that the government should not try to run the church. Examples of the application of this rule include passing laws endorsing a state-run church or not allowing people the freedom of opportunity to worship as they choose. The First Amendment does not prohibit Christians from being involved in government. [*See e.g.* Jesse Jackson]. It prohibits politicians (the state) from running the church.[2]

Under the facts of Petitioner's case, the Gardner family *sua sponte* donated the Ten Commandments panel to the Cobb County Courthouse in 1939. [Petition for *cert.* at 3]. This was apparently an exercise of the Gardner's right to freedom of speech under clause 3 of the First Amendment. Justice O'Connor has noted, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect". [*Doe v. Small*, 964 F.2d 611, 617 (7th Cir. 1992), citing *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990)]. "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed". [*Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) and *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983)]. The Gardner's Ten Commandments panel has been in the Petitioner's Courthouse or on their grounds since 1939. Public courthouses have been used for individual free speech forums in times past for liberal causes and the same freedom of opportunity and equality should be accorded conser-

---

[2] The U.S. News survey mentioned earlier noted that 78% of those surveyed believe that the "...president should be a moral and spiritual leader". [*Cf.*, *Life Magazine*, "Why We Pray", page 54 *et seq.* (March, 1994)].

vative points of view. [*See e.g., Texas v. Johnson*, 491 U.S. 397, 399 (1989) and *Cohen v. California*, 403 U.S. 15, 16 (1971)].

It is uncontested that county or state support of the Gardner's gift was *de minimus* at best. [Petition for *cert.* at 10-11. *Accord, Harvey*, 810 F.Supp. 672-673]. The focal point of Respondent's complaint is that they do not like what is said in the panel. "Over forty years ago, the Supreme Court recognized that while free speech breeds controversy, it must be protected." [*Americans United For Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1542 (6th Cir. 1992), citing *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)]. "Offense to moral and religious sensitivities does not constitute an injury in fact and is insufficient to confer standing" to sue. [*Gonzales v. North Tip of Lake County, Indiana*, 4 F.3d 1412, 1416 (7th Cir. 1993)]. It is naive for the courts below to enable Respondents to completely eliminate the Ten Commandments panel by refusing to work with Petitioner, but then in turn to expect Respondents to work with Petitioner to save said panel through a settlement. Two federal circuits have noted that the federal *courts* cannot obtain complete majority opinion agreement on this subject. It is not reasonable to believe adverse parties can agree better than judges on this issue. [*Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 309 (6th Cir. 1990) and *Kreisner v. City of San Diego*, 1 F.3d 775, 783 (9th Cir. 1993)]. Even though Respondents apparently did attempt, in good faith, to peacefully resolve this case; few other Respondents would be so fair. "Absolute power corrupts absolutely". [Bartlett's, *Familiar Quotations* 50th ed. "Lord Acton" 615:15 (Little, Brown & Co. 1982)].

By way of example, Amicus will take the Eleventh Circuit's logic out of Georgia and place it in Tennessee.[3] The Tennessee State Capital is in Nashville, Tennessee. On the

[3] Amicus knows that Tennessee is in the Sixth, not the Eleventh Circuit.

capitol grounds, surrounding the capitol, are approximately eight monuments.[4] The most significant for the purposes of this brief is the grave of President James K. Polk and his wife Sarah Childress Polk. Among the statements made on the Polks' tomb are:

1. "The excellence of Christianity was exemplified in his death."
2. "Asleep in Jesus";
3. "A noble woman, a devoted wife; a true friend, a sincere Christian.";
4. "Blessed are the dead which die in the Lord."

Approximately ten yards to the south of Polk's tomb is a state historical marker remembering the "Holy Rosary Cathedral" (1820), the first Catholic Church in Tennessee. This marker notes that Tennessee's first Catholic Bishop, R.P. Miles, was appointed on the present capitol site in 1847. To the north of Polk's grave is a statue of President Andrew Jackson.[5] Other monuments include U.S. Senator Edward Carmack's "Pledge To The South" (placed by the Womens Christian Temperance Union), which includes a reference to praying to God; a masonic time capsule; a statue of Alvin C. York, (a religious conscientious objector to war — until he became the greatest hero of W.W.I), and a copy of the Liberty Bell. The final statue, which overlooks the Tennessee Supreme Court, is in tribute to Civil War hero Sam Davis. This monument talks of the Lord "calling up earth's heroes" and quotes John 15:13.[6] Retaining the status

[4] Amicus presents the information relating to the monuments surrounding the Tennessee State Capital pursuant to F.R.E. 201, 202 and/or "Information Lodging". [*See e.g., Turner v. U.S.*, 396 U.S . 398, 412 fn. 15 (1970) and L. Caplan, *The Tenth Justice, The Solicitor General and the Rule of Law* at page 22 (A.A. Knopf Press, 1987)].

[5] Jackson's home, "The Hermitage", is a federal historic site, as is the church which President Jackson built, which is part of said historic site.

[6] "Greater love hath no man than this - that a man lay down his life for his friends."

quo on First Amendment rights conforms to the original intent of the Constitution. [*See generally*, J. Eidsmoe, *Christianity And The Constitution*, 355-378 (Baker Book House, Co. 1987)].

The present opinions in Petitioner's case would appear to allow a non-religious organization to either require Tennessee to place other monuments, which Respondents dictate, on the capitol grounds or in the alternative, the present standing monuments must be removed or greatly modified. This flies in the face of *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (*Brennen* concurring) which says that religious speakers *have the same right to public forums as non-religious speakers*. [*Accord Widmar v. Vincent*, 454 U.S. 263, 269 (1981)]. The Carmark and Davis monuments were placed on the grounds of the capitol pursuant to private, not public, funds according to the plaques attached to the monuments. The Polk grave does not indicate how funding for the grave occurred. "Religious speech may not be excluded from public forums just because passersby misunderstand the public role." [*Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1394 (11th Cir. 1993). *But see*, *Kaplan v. Burlington*, 891 F.2d 1024, 1029 (2nd Cir. 1989) and *Smith v. County of Albemarle*, 895 F.2d 953, 958-960 (4th Cir. 1990)]. The "free speech" wording of the monuments are subject to complete undermining by liberal groups under the Eleventh Circuit's grant of an absolute veto power. This same power, left unchecked, could also be used by conservatives to eliminate "X-Rated" art displays in public forums. While Amicus is not promoting obscenity, it is important for the Court to see the "Pandora's Box" the present order in this case creates.

Although the monuments on the Tennessee State Capitol grounds have religious overtones, the reason James K. Polk is buried on the Tennessee State Capitol grounds is because of *who* President Polk is — *not* the fact that he was a Christian. The other people honored are noted Tennesseans that happened to be religious. Under the case now before this Honorable Court,

each of the monuments discussed could be dismantled because of its religious overtones, even though the person, not his beliefs, are the focus of the honor conveyed to each. A person's beliefs and convictions are their greatest assets.

The order of the Eleventh Circuit does not address whether the Ten Commandments panel is a tribute to God or the Gardner family of Cobb County, Georgia's public service, personal beliefs and lives. While this issue has been acknowledged as important, no court has directly addressed this point. [*See Kreisner v. City of San Diego*, 1 F.3d 775, 782 and 786 (9th Cir. 1993)]. A precedent that says a public tribute to private citizens cannot acknowledge the honoree's views strips America of much of its history and culture. It would be a shame to eliminate a James K. Polk (or a *Reverend* Martin Luther King, Jr.) from their deserved places of honor because they personally believed in God. It would be illogical to honor Polk or King, but *not* for what they "stood for". Justice Brandeis said:

> There is in most Americans some spark of idealism, which can be fanned into a flame... the results are often extraordinary.

[Bartlett, *Familiar Quotations*, 50th ed. "Louis Dembitz Brandeis", 678:4 (Little, Brown & Co. 1982)]. Whether or not one agrees with President Polk's (or Reverend King's) views is not a legitimate reason to erase their beliefs and names from public monuments, roads, buildings and museums. [*Accord, Larson v. Valente*, 456 U.S. 228, 662-663 (1982) (Kennedy concurring). *See also, Murray v. City of Austin, Texas*, 947 F.2d 147, 154 (5th Cir. 1991)]. This Honorable Court has rejected focusing solely on the religious component of a challenged action/monument when deciding if said monument is constitutional. [*Lynch v. Donnelly*, 465 U.S. 668, 676-677 (1984)].

The decision of the Eleventh Circuit focuses only on the words of the Ten Commandments panel, not why the panel was placed in the Cobb County Courthouse. [*See Harvey*, 811

F.Supp. at 675 hn. 4]. "The public forum doctrine would be rendered meaningless if only places in the middle of nowhere could be free speech areas, and if all speech that occurred near 'structural symbols of government' had to be viewed as government speech". [*Kreisner v. City of San Diego*, 1 F.3d 775, 786 (9th Cir. 1993)]. By giving Respondents an absolute *de facto* veto power regarding the public display of the Ten Commandments panel, the lower courts are placing preference for non-religion over religion. This is in direct conflict with the Fifth Circuit which holds, "To the extent that the Establishment Clause prevents preferences for one religion over another it likewise prevents preferences for religion over non-religion" (or vice-versa). [*Murray v. City of Austin, Texas*, 947 F.2d 147, 155 (5th Cir. 1991)]. The notion that the Gardner's Ten Commandments panel, which was allowed to fall into dilapidation by Petitioner, poses "...a real danger of establishment of a state church is far-fetched indeed". [*Lynch v. Donnelly*, 465 U.S. 668, 686 (1984)]. As noted by the Seventh Circuit, "...the First Amendment is intended to restrict religious activity not by individuals but by the government". [*Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160, 1168 (7th Cir. 1992)]. If Paul Robert Cohen can use a California courthouse to curse the draft, and Gregory Lee Johnson can burn the American Flag in front of a Texas courthouse, why can't the Gardner family use a Georgia courthouse to say, "Honor Thy Father and Thy Mother"? [*Cohen v. California*, 403 U.S. 15, 16 (1971); *Texas v. Johnson*, 491 U.S. 397, 399 (1989); and *Harvey*, 811 F.Supp. at 672]. The lower courts also violated the rule of *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) that suggests that courts must determine if the Gardner's Ten Commandments panel's placement was presented to Cobb County, Georgia "primarily if not entirely, by a legitimate secular purpose". In this case, that logical free speech secular purpose was the Gardner family reminding the citizens of Cobb County, Georgia of their family

and its generosity. [*See generally, A.C.L.U. v. Rabun County Chamber of Commerce*, 678 F.2d 1379, 1390 (11th Cir. 1982)].

As noted by the Tenth Circuit, the federal courts of appeals of four circuits are split over the issue of an individual's standing to attack a public display of a religious symbol, such as the Ten Commandments, on government property under the Establishment Clause. [*Foremaster v. City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989)]. The Seventh Circuit requires avoidance or change of behavior because of the offensive symbol. The Tenth, Sixth and Eleventh Circuits simply require personal contact. [*Id.*]. A free speech issue gives Respondents even less standing to complain about the Gardner's 1939 gift to Petitioner. [*See e.g., Widmar v. Vincent*, 454 U.S. 263, 271 (1981)]. This conflict justifies a grant of certiorari by this Honorable Court pursuant to Sup. Ct. R. 10.1(a) and (c) because several circuits are at odds in this case and clauses 1 and 3 of the First Amendment conflict on the facts in this case. Who is doing the "talking" through the Ten Commandments panel — the Gardners or Cobb County, Georgia?

In conclusion, Amicus would respectfully note that even though the Petitioner's Ten Commandments panel stood alone in a corner of the Cobb County Courthouse, other symbols apparently adorned other, and more prestigious, parts of the courthouse. At least one Respondent noted that the panel indicates the influence of religion in general and Christianity in particular on our government and court system. [*Harvey* 811 F.Supp. at 673, point 13]. This is not an attempt by Petitioner to exalt one religion over another. It simply acknowledges the historical value of the Ten Commandments to American jurisprudence and the Gardner family to local history. This would be the same basic reason that Nashville, Tennessee's Women's Christian Temperance Union placed "Carmack's Pledge to the South" upon the Tennessee State Capital grounds — to honor a person and his beliefs. History, such as conveyed by the Ten

Commandments panel, shows an unbroken practice of honor to individuals such as the Gardner family who just happen to be religious. The historic significance of the Ten Commandments (or individuals and their views) "...is not something to be lightly cast aside".[7] [*Murray v. City of Austin, Texas*, 947 F.2d 147, 115 (5th Cir. 1991), citing *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970)].

## CONCLUSION

As noted in *Lynch v. Donelly*, 465 U.S. 668, 676-677 (1984):

> The very chambers in which oral arguments on this case were heard is decorated with a notable and permanent — not seasonal — symbol of religion: Moses with the Ten Commandments.[8]

If the decision of *Harvey v. Cobb County, GA*, 811 F. Supp. 669 (N.D. Ga. 1993) remains precedent, in direct contradiction of multiple cases from this Honorable Court, the Ten Commandments will be stripped from the Cobb County Courthouse wall. The next logical step is to sandblast President Polk's grave because it acknowledges his belief in God. The chambers of this Honorable Court cannot be far behind. Finally, will even the Declaration of Independence be removed from state and federal buildings? [*See generally*, J.W. Whitehead, *The Second American Revolution*, 93-100 (Crossway Books, 1982)]. It is illogical to give Respondents an *absolute* veto power regarding the decorations of Petitioner's courthouse. Justice Holmes said,

---

[7] "The Supreme Court has raised, but never resolved, the question of whether avoiding an Establishment Clause violation provides a compelling state interest justifying a content-based restriction on speech in a public forum." [*Kreisner v. City of* San Diego, 1 F.3d 775, 783 (9th Cir. 1993)].

[8] Members of this Honorable Court that were sitting during the building or planning stages of the present U.S. Supreme Court Building include: Taft, Hughes, Stone, Holmes, Brandeis and Cardozo among others.

"If there is a principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate". [*U.S. v. Schwimmer*, 279 U.S. 644, 653 (1928)]. Protect the Gardner's constitutional opportunity to express their thought! Certiorari should be granted.

This 24 day of May, 1994.

Respectfully submitted,

Alexis I. Crow
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3388

Of Counsel

Gregory D. Smith
*(Counsel of Record)*
TN BPR# 013420
THE RUTHERFORD INSTITUTE
One Public Square
Suite 321
Clarksville, TN 37040
(615) 647-1299